SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. [redacted] 88

MRS. LESLIE F. SLADE, ET AL.,
Petitioners,

vs.

SHELL OIL COMPANY, INC., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mrs. Leslie F. Slade, widow, for herself, individually, and her daughter, Helen Jane Slade, a minor, called plaintiff or petitioners, as against Shell Oil Company, Inc., called defendant, and Pacific Indemnity Company, surety on its appeal bond from the District Court, herein called respondents, show:

A.

Summary Statement of Matters Involved.

1. The suit. This was in the Federal District Court, Jackson, Mississippi, for the wrongful death of Leslie F.

Slade, husband and father of petitioners, respectively, wherein the judgment was for $35,000.00.

The time. The accident happened at approximately 7:15 A. M., March 4, 1940, in an artificial fog created wrongfully by defendant, and is the first case almost wherein the fog was a cause—not a condition.

The place. Near Norco, Louisiana, on United States transcontinental Highways Numbers 51-61, known as "the Airline", leading into New Orleans, very extensively traveled, and constructed in 1934.

Defendant's wrong. This was the wrongful creation over the highway of an artificial fog, which varied from time to time in intensity, being at times absolutely so thick as to preclude any visibility. Defendant operated a large oil refinery abutting the highway for many years, wherein there was distillation of crude petroleum, heated to as high as 950°, with condensation, with water as the cooling agency. The water having absorbed the heat—there being no cooling towers,—was discharged into an open ditch at the rate of 8,000 gallons per minute, going to, under, across, and along the highway. This superheated water gave off vapor and steam, and, under climatic conditions prevalent in that part of Louisiana, had frequently theretofore caused very dense fogs over the highway, the character appearing in the Parish newspapers as early as 1934 thus:

> "Some lost their way in densest fog——
> The Norco, steam-made kind——".

Defendant did naught between 1934, when the Air Line Highway was opened, and March, 1940, to rectify the cause, which was in total disregard of the lives of those lawfully traveling the highway.

The facts of the accident. Defendant's fog, variant and varying, was present over the highway, which then consisted of two paved traffic lanes on a dump, wide enough for a

four-lane highway. From this dump defendant constructed a road into its plant and adjacent to the hot-water ditch. A truck, identified herein solely as the "chicken truck", moving east—the highway running east and west,—lost its way, its driver parking on the south side of the pavement to clear his windshield, presumably. Simultaneously, the L. & A. truck, driven by Arnold, moving west, was on the extreme south of the dump, seeking to turn into defendant's plant on the gravel road. Going east, on the proper side, was the Greer truck, which, finding the fog, took to the south shoulder, and, in dodging the L. & A. truck, overturned between the Arnold and the chicken trucks. Whereupon, Slade, who was a short distance behind Greer and driving with due care a 32-foot tractor and trailer combination motor vehicle, in interstate commerce, entered the fog, his right wheels left the pavement (R. 182), struck the overturned truck in the fog, his trailer, heavily loaded, broke the connecting pin and crushed his cab from the rear, killing him instantly.

Apparently, Slade, in leaving the pavement, was doing exactly as the law of Louisiana and as the rules of the Interstate Commerce Commission required him to do when he was confronted by this fog, assuming he was going to stop by reason of there being "no visibility". That is to say, he knew it was practicable to take to the shoulder and clear the pavement of his truck, and he knew it was against the rules for him to stop and park upon the pavement. Slade, in doing as required by the State and Federal laws, collided with the overturned truck before he had reached a point on the shoulder (R. 182) sufficient to clear the pavement of his truck and trailer,—32 feet overall length. Slade, of course, is dead. What his intentions were, no man can tell, but the presumption, under the law is, as hereinafter shown, that the course by him pursued was dictated by a desire to live, and that he was in the exercise of due care. Certainly, going

on the shoulder, which was approximately twenty-nine feet wide, indicated strongly a desire to avoid injury by driving carefully. Compare, Appendix "A", where Rule 15, Act 286, Laws 1938 of Louisiana, and Rule 2.22, Safety Regulations of the Interstate Commerce Commission, are printed in parallel columns.

The pleadings. Pursuant to Rule 8, plaintiff's complaint contained a full factual statement showing in Count One liability potentially to exist because of (a) negligence, (b) nuisance, and (c) gross negligence tantamount to wantonness and wilfulness. In Count Two, the factual averments of Count One were adopted, but liability was definitely predicated upon an alleged nuisance (R. 1-10):

After a bill of particulars had been supplied by petitioners on defendant's demand, the case was tried.

The trial. After an elaborate hearing, the District Judge instructed a verdict for defendant as to the second count "for the reason that there is no evidence of any nuisance" (R., 531), but, under charges, submitted the case. Whereupon, verdict was returned, the District Judge refused to vacate, and, upon appeal, solely on the ground that contributory negligence was conclusively shown, the judgment was reversed in an opinion by Circuit Judge Hutcheson, Circuit Judge Sibley concurring. Circuit Judge Holmes dissented, declaring:

> "Different inferences might be drawn by fair and reasonable men as to the density of the fog and as to whether it was negligence to move within it at a speed not exceeding ten miles per hour. The District Court did not err in refusing to decide, as a matter of law, that Slade was negligent in proceeding into a thin fog that suddenly became dense after he had traveled a short distance."

B.

Reasons Relied Upon for the Allowance of the Writ.

1. Contrary to *Illinois C. R. Co.* v. *Moore,* 312 U. S. 630, 85 L. ed. 1089, and *Erie R. Co.* v. *Tompkins,* 304 U. S. 61, the majority opinion disregarded, without reference, the controlling decisions of Louisiana (*Gaiennie* v. *Cooperative Produce Co.,* 196 La. 417, 199 So. 377, 610, Appendix "B", and other cases), when it vacated the jury's verdict, which verdict properly established, in accordance with Louisiana law, defendant's liability.

Said opinion assumed to settle an important principle of Louisiana law in palpable conflict with the controlling Louisiana statutes, as interpreted by the Supreme Court of that state.

2. The majority opinion in the Court of Appeals, in construing questions of Louisiana law, decided substantial questions of state law in a way which probably conflicts with the applicable Louisiana decisions,——

(a) As to the burden of proof as to contributory negligence. *Buechner* v. *New Orleans,* 112 La. 599, 36 So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455 (frequently approved, compare *Oliphant* v. *Lake Providence,* Ct. App., 2d Cir., 139 So. 516-524); *Palmer* v. *Hoffman,* 63 S. C. 477, 87 L. ed. 427.

(b) The decedent is "conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm." *Lipscomb* v. *Publishing Corporation,* (Ct. App., 2d Cir., (5 So. 2d, 45; *Aymond* v *Western U. Tel. Co.,* 151 La. 184, 91 So. 671.

(c) An estimate "by the occupants of an auto towards which the other car is coming * * * has no probative

value * * *." *Mutti* v. *McCall,* (Ct. App., 1st Cir.), 130 So. 229, 230.

(d) Weight and sufficiency of the evidence are solely for the jury.

3. The Court of Appeals, in the majority opinion, has "so far departed from the accepted and usual course of judicial proceedings" that certiorari should be granted:

(1) Because of violation of the Seventh Amendment as to jury trials;

(2) Contributory negligence, under the majority opinion herein rendered, may not be judicially established, as by the opinion affirmatively shown.

4. The majority opinion further assumes to settle an important principle of Federal law, not precedently decided here, adversely determined.

Under Rule 8 (Appendix "C") for the District Courts, plaintiff stated all facts in Count One, and therein demanded judgment for an injury predicatable upon (a) negligence, (b) absolute nuisance, and (c) possible wantonness and wilfulness. Plaintiff likewise added Count Two, reaverring facts set out in Count One by reference, and therein counted upon legal liability arising from absolute nuisance, consisting in the creation and maintenance of an impenetrable fog on a transcontinental highway. The District Judge directed a verdict for defendant on the Second Count for want of evidence, but submitted the cause to the jury on the facts. The jury found for plaintiff by reason of defendant's creation and maintenance of the fog. Plaintiff did not appeal from the direction of the verdict as to the nuisance, that is, creation and maintenance of the fog, but defendant did. Plaintiff did not cross appeal, resting his recovery, however, upon the creation and maintenance of the fog,—obviously a nuisance.

Now, notwithstanding the Court of Appeals admits the creation and maintenance of the fog, whereto contributory negligence is not a defense, it has remanded the cause for a new trial, whereunder plaintiff is to be precluded from relying upon absolute liability arising from the nuisance and possible wanton, wilful injury.

The Court of Appeals, under Rule 8, having jurisdiction of the entire controversy, should have remanded the cause for a trial on all of the facts, giving plaintiff the right to recovery, if entitled thereto, because of (a) negligence, (b) absolute nuisance, and (c) wilfulness and wantonness, and when, upon a case perfectly proved, contributory negligence was made a defense by the Court of Appeals and plaintiff's rights divested, wrongful construction of Rule 8 was had.

5. Where a driver of a motor truck, engaged in interstate commerce, has fully complied with Interstate Commerce Safety Rules and not thereunder been guilty of contributory negligence under a jury verdict, the state in which the death happened may not prescribe a rule of law as to contributory negligence which will defeat an action for wrongful death, the rules prescribed by the Interstate Commerce Commission being the supreme law of the land and exclusive of state authority.

6. And for other reasons appearing and to be assigned at the hearing.

WHEREFORE, petitioners pray for writ of certiorari from this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain therein named, a full and complete transcript of the record and all proceedings in the cause numbered 10353 and entitled *Shell Oil Company, Inc.* v. *Mrs. Leslie F. Slade,* et al., and that said judgment of the

said Court may be reversed and petitioners afforded appropriate relief.

Respectfully,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

(1) There was no opinion in the District Court, but a charge to the jury appears (R. 531). The opinion of the Court of Appeals appears (R. 600), 133 Fed. (2d) 518, and a copy is made Appendix "D" hereto, for the Court's convenience.

II.

Jurisdiction.

1.

The date of the judgment to be reviewed is, entered February 2, 1943, originally; Petition for Rehearing filed and denied March 12, 1943 (R. 622).

2.

Petitioners advance these specific claims:

The majority opinion of the Court of Appeals is erroneous in the following particulars:

1. It disregards, without citation, controlling Louisiana statutes and decisions.

2. It violates Article VII, Amendments, Constitution of the United States, as to jury trials.

3. As affirmatively appears from this opinion, in the Fifth Circuit, it disregards "weight and credibility", and sets up in the Fifth Circuit a right of judicial review as to contributory negligence not elsewhere obtaining.

4. It wrongfully precludes, under Rule 8, plaintiff from having a recovery for death caused by an absolute nuisance, by assuming to discharge the defendant on the ground of decedent's contributory negligence. Contributory negligence is not a defense to such a cause of action.

5. It vacates a verdict finding complete compliance with the Interstate Commerce Commission's Safety Rules for trucks moving in interstate commerce and assumes to reverse in virtue of a rule of law promulgated by the State of Louisiana, wherein the death occurred, thereby excluding the rules of the I. C. C. from their proper operation.

3.

Jurisdiction is invoked under *Judicial Code*, Section 240, as amended by Act of February 13, 1925, 43 Stat. 938, Section 347, 28 *U. S. C. A.*

4.

Jurisdiction is sustained by *Illinois C. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. ed. 1089; *Conway* v. *O'Brien*, 61 S. Ct.

634, 312 U. S. 492, 85 L. ed. 969; *Tiller* v. *Atlantic Coast L. R. Co.*, 63 S. Ct. 444, 87 L. ed. 453, reversing Fifth Circuit, 128 F. (2d) 420.

III.

Statement of the Case.

Reference is respectfully made to "Summary Statement of Matters Involved", *supra*, in the Petition for Certiorari. Supplemental statements will be made in the argument. For the Court's information, copies of the briefs filed in the Court of Appeals are made available herewith.

IV.

Specifications of Error.

Specification No. 1.

The Court of Appeals decided, as to contributory negligence of Slade, in a manner in palpable conflict with controlling Louisiana statutes and decisions, which were not cited, and whereunder the jury verdict, as rendered, was conclusive of the non-existence of contributory negligence.

Specification No. 2.

The Court of Appeals likewise disregarded directly applicable decisions of the State of Louisiana and decided this cause in a way not in conformity thereto in the following particulars:

(a) In disregarding the burden of proof as to contributory negligence;

(b) Disregarding the presumption of due care created by Louisiana law;

(c) Accepting as binding upon petitioners an alleged estimate assumed to be made by those who were so sitused

and circumstanced as to the oncoming truck as to be, under Louisiana law, unable to give an opinion entitled to weight thereunder;

(d) In disregarding the jury's finding of due care as to speed when it affirmatively was shown by the witness Arnold that it was not in "excess of ten miles per hour." (R. 181, 182).

(e) Further principles of Louisiana law whereunder in each particular case the facts are to be separately reviewed and no general rule announced.

Specification No. 3.

There was the establishment by this opinion in the Fifth Circuit of an erroneous rule, conflicting with rules obtaining in this Court and in the other Circuits, when the Court of Appeals in this cause in the Fifth Circuit, by declaring that certain alleged facts were "without substantial conflict", reversed a jury verdict, when the verdict, as from the opinion affirmatively appeared, was based upon adequate credible evidence.

Specification No. 4

The Court of Appeals erred in precluding plaintiff's right to recover from defendant for absolute nuisance and wilful injury properly pleaded and proved, when plaintiff, having been accorded a recovery for creation and maintenance of the impenetrable fog on the public highway, did not appeal from direction of a verdict on a Second Count predicating liability upon nuisance, that is, the creation and maintenance of the fog, when the jury, the District Judge and the Court of Appeals all concede the defendant's fog to be herein the efficient cause of Slade's death. Under Rule 8, on remand, defendant cannot escape liability on ground

of alleged contributory negligence for this is not a defense to the wrong wrought by defendant.

Specification No. 5

Where a driver of a motor truck, engaged in interstate commerce, has fully complied with Interstate Commerce Safety Rules and not thereunder been guilty of contributory negligence under a jury verdict, the state in which the death happened may not prescribe a rule of law as to contributory negligence which will defeat an action for wrongful death, the rules prescribed by the Interstate Commerce Commission being the supreme law of the land and exclusive of state authority.

V.

ARGUMENT.

Point 1.

When the majority opinion of the Court of Appeals assumed to establish Slade's contributory negligence as a matter of law (citing therefor certain cases[1]), in moving too fast when he struck the overturned truck, by reason of defendant's fog not seeing same in time to avoid the collision (assuming contributory negligence to constitute a defense, which is not the case where there is a breach of an absolute duty, Point II, infra), that court, contrary to Ilinois C. R. Co. v. Moore, 312 U. S. 630, 85 L. Ed. 1089 and Erie R. Co. v. Tompkins, 304 U. S. 64, directly disregarded, without reference, the controlling decision (Gaiennie v. Cooperative Produce Company, 196 La. 417, 199 So. 377, 610, Appendix "B", infra) in the Supreme Court of Louisiana, the highest court in that State, whereunder, in proper

cases, the jury could find, as it did here, notwithstanding the collision, that plaintiff was free from contributory negligence.

1. The Federal Court must apply the Louisiana statute, as construed by its Supreme Court. Compare *Illinois C. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. ed. 1089, wherein the Fifth Circuit, with the same Judge dissenting, misapplied a Mississippi statute, as construed by Mississippi's Supreme Court, disregarding that therein held (5 Cir., 112 Fed. 2d 959); *Tiller* v. *Atl. C. L. R. Co.*, 63 S. Ct. 444, 87 L. ed. 453, likewise reversing the Fifth Circuit, 128 Fed. 2d 420; *Conway* v. *O'Brien*, 312 U. S. 492, 85 L. ed. 969; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

2. The jury, the District Judge and the Court of Appeals each found defendant in fault by creating and maintaining the fog. The liability therefrom might arise by reason of (a) negligence; (b) absolute nuisance, 39 *Am. Juris.*, 475; Judge Cardozo in *McFarlane* v. *Niagara Falls*, 247 N. Y. 347-8, 160 N. E. 393, 57 A. L. R. 1; *Hoffman* v. *Bristol*, 113 Conn. 386, 155 Atl. 499, 75 A. L. R. 1191; and (c) possible wilful or wanton negligence. *Evens* v. *Texas, etc., R. Co.*, 5th Cir., 134 Fed. 2d 275.

But, assuming contributory negligence to be a defense, for argument sake, then,

3. The Court of Appeals disregarded controlling Louisiana authority.

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[1] *O'Rourke* v. *McConaughey*, (Ct. App., Orleans), 157 So. 598; *Dominick* v. *Haynes Bros.*, (Ct. App., 2d Cir.), 127 So. 31, 32; *Raziano* v. *Trauth*, (Ct. App., Orleans), 131 So. 212; *Rector* v. *Allied Van Lines*, (Ct. App., 2d Cir.), 198 So. 516; *Magvio* v. *Bradford Motor Exp.*, (Ct. App., Orleans), 171 So. 859; *Inman* v. *Silver Fleet*, (Ct. App., 1st Cir.), 175 So. 436; *Hutchinson* v. *James*, (Ct. App., Orleans), 160 So. 447; *Penton* v. *Sears*, (Ct. App., 1st Cir.), 4 So. 2d 547; *Russo* v. *Aucoin*, (Ct. App., 1st Cir.), 7 So. 2d 744; *Castille* v. *Richard*, 157 La. 274, 102 So. 398, 37 A. L. R. 586.

(a) *Statutes.*

By Act No. 286 of 1938, Title II, Rule 4, Laws Relating to Motor Vehicles and Their Operation on the Streets and Highways of Louisiana, it was made——

> "Unlawful for any person to drive or operate any motor or other vehicle upon the public roads, highways and bridges of this State at other than a careful, prudent, reasonable and proper speed, having due regard to the traffic, surface and width of the highways, the location and neighborhood, and any other conditions or circumstances then existing, and no person shall, under any circumstances or conditions, drive any vehicle upon the public roads, highways or bridges of this State, at such speed as will endanger the life, limb or property of any other person * * *."

(b) *Decisions.*

The Court of Appeals assumed to hold as a matter of law that Slade's alleged failure to see (he was dead and did not testify), and his collision with the overturned truck, approximately of the same color as the ground about it, exculpated defendant, whose negligence had been found by the jury to consist in the creation of an impenetrable fog, which at that point human eye could not pierce, constituting an absolute nuisance. Circuit Judge Hutcheson assumed to follow those cases from the inferior courts of appeal in Louisiana cited in the margin, which can be easily differentiated in most cases, but which, when they cannot so be, will be disregarded under the later decision of the Supreme Court.

Initially, the Court of Appeals had held the question in each case of a failure thus to see and stop as one wherefore due care might be shown by giving a reasonable excuse.

Compare *Futch* v. *Addison et al.*, 12 La. App. 535, 126 So. 590; *Stafford* v. *Nelson Bros.*, 15 La. App. 51, 130 So.

234, 235; *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317, 318.

Later, the Courts of Appeal deviated more or less from the rule just quoted and continued thus until *Gaiennie* v. *Co-operative Produce Co.*, 196 La. 417, 199 So. 610, where there was a parked truck on a through highway and a collision therewith by Gaiennie. The Court of Appeals found the parking gross negligence, but being in doubt as to the contributory negligence on the part of Gaiennie, (who was acting, by presumption, at least, precisely as Slade had acted), the First Circuit certified that case to the Supreme Court, where decision was had, 196 La. 417, 199 So. 377, with a rehearing denied. *Castille* v. *Richard* (Sup. Ct. La.), 157 La. 274, 102 So. 398 is not in any way in conflict.

The facts in the *Gaiennie Case*, as to the alleged contributory negligence in not seeing and stopping are thus stated (199 Sou. 612):

> "Therefore, to traffic coming from the west, this truck, parked on a portion of the paved slab of the highway in the dark, was an object of peril placed and permitted to remain there through the negligence of Monte, who, it is admitted, was acting within the scope of his employment.
>
> "Within a period of time which is not fixed, but which we estimate to be several minutes, during which Monte, the driver of this truck, occupied himself in a rather indefinite manner, as far as his testimony shows, in looking for flares in the truck, Charles S. Gaiennie, the plaintiff herein, approached the truck from the west in a Chevrolet coach belonging to his employer and which he was driving at a rate of speed estimated to be from 35 to 40 miles per hour. He kept his car in the south lane of travel on the paved portion of the highway which was to his right, and as he neared the point where the truck was parked he began meeting cars going west or in the opposite direction to that in which he was traveling. There were four or five cars

following each other and all of them with the headlights burning so brightly as to dazzle his eyesight intermittently. He dimmed the headlights on his car and slowed down its speed to between 20 and 25 miles per hour.

"The effect of the dazzling lights from the cars he was meeting was that he was not blinded by them but his vision was momentarily and intermittently impaired to the extent that instead of having a full view of the paved highway ahead of him as he had without such impairment, his view of the pavement was limited to approximately 18 or 20 ft. within which distance he could, at the speed he was going, bring his car to a stop. As he had dimmed the headlights on his car, that had the effect of tilting the beam of light downward at an acute angle on the pavement in front of him, this also causing some restriction in his sight of the pavement as far as distance was concerned.

"Plaintiff felt safe in proceeding on the highway under the circumstances, and he did. As he passed the last of the series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car, in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. The rear body of the truck was some 3 or 4 feet above the ground and extended back some four feet over the rear wheels, so that when plaintiff dimmed his lights the tilted beam of his headlights projected under the truck making it that much more difficult for him to see it."

Whereupon, the Supreme Court, in a unanimous opinion, held:

"The burden of proof is on the defendant to show that the plaintiff was negligent and that his negligence contributed to his injury. Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270; Washington & Georgetown R. Co. *v.* Harmon's Adm'r,

147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284. This doctrine was approved in Loprestie *v.* Roy Motors, Inc. et al., 191 La. 239, 185 So. 11.

"In the case of Woodley & Collins *v.* Schusters' Wholesale Produce Co., Inc., 170 La. 527, 128 So. 469, in discussing whether or not the driver of an automobile should be deemed negligent for failing to slow down, we stated that it depended on the circumstances of the particular case, and that it is not easy, nor safe, to lay down a hard and fast rule on the subject. The difficulty in laying down a hard and fast rule is that the act provides that the conditions and circumstances must be considered as well as the traffic, surface and width of the highway, and the location of the neighborhood. Such being the case, the particular facts of each case must be considered in arriving at a conclusion, and it would not be safe to lay down a hard and fast rule for that reason.

"In the case of Louisiana Power & Light Co. *v.* Saia et al., La. App., 173 So. 537, the court stated in effect that a great many cases have held that the failure of the driver of a moving vehicle to observe an obstruction—usually in the form of a stationary vehicle—constituted such negligence as would prevent recovery, and cited many cases to that effect; but, the court aptly said in effect that this result had not been reached regardless of surrounding circumstances and facts. In fact, the courts have been careful to say in each case that no circumstances were involved that would justify the failure of the driver to see the object ahead. It would appear that this is a reasonable interpretation of the provision of Act No. 21 of 1932, aforementioned, because it specifically provides that the conditions and circumstances must be considered. While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253.

"In Kirk *v.* United Gas Public Service Co., 185 La. 580, 170 So. 1, this court stated that the general rule is not inflexible, and that its application depends on the facts and circumstances of each case. Many cases were cited therein where the rule was relaxed and the driver of the automobile exonerated from negligence.

"Many cases have held to the effect that ordinarily a motorist is negligent in not slowing down to a speed at which he can stop instantly when blinded by headlights. However, a careful examination will reveal that the circumstances and facts of each case were taken into consideration in arriving at a conclusion. Also, it has been held in many cases that a motorist was guilty of negligence because he failed to see the obstruction or object in time to stop before colliding with it; but, the facts and circumstances of each case have been considered in determining whether or not the motorist had sufficient reasons for not seeing the object or obstruction in time to stop.

"In the case of Moncrief *v.* Ober, 3 La. App. 660, it was held that a small cable stretched above the surface of a public road was such an unusual obstruction that the failure of a motorist to detect it did not indicate negligence on his part.

"In the case of Kirk *v.* United Gas Public Service Co., supra, wherein a motorist saw an object ahead of him in the road which he thought was a shadow or repaired patch in the road and did not observe that it was a dead yearling until a moment before it was struck, when it was too late to stop, we arrived at the conclusion that it would be unreasonable to hold the motorist negligent in failing to see the yearling sooner than he did.

"From the facts certified it appears that the plaintiff was driving at a moderate rate of speed, between 40 or 45 miles an hour, on an open highway, with his car properly lighted, and that he slowed down to between 20 and 25 miles an hour on meeting the approaching cars. There is nothing to indicate that the neighbor-

hood within the vicinity was thickly populated. There is nothing in the facts to indicate that the location was such that the plaintiff would expect cars to be parked on the highway, as would be expected where the location was thickly populated. It appears that the plaintiff was travelling at such a speed, after he slowed down, to enable him to meet an ordinary emergency under the circumstances. If the truck had been parked entirely on the pavement the plaintiff could more easily have seen the wheels and running gear, but the truck was parked at an angle on the edge of the highway with the body extended out into the road some three or four feet above the ground, and some four feet beyond the rear wheels. It was the duty of the plaintiff when meeting the approaching cars to dim his lights. When he dimmed the lights the beam was necessarily thrown down on the highway, causing it to shine under the rear end of the truck, which was protruding some distance over the road. Under these circumstances, we do not think the plaintiff was negligent in failing to see the truck sooner than he did.

"For the reasons set out above, our answer to the first question is that we cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case.

"Our answer to question two is that under the facts outlined the plaintiff was not guilty of contributory negligence."

And thus answered that Gaiennie, so driving, was not guilty of contributory negligence, and the case for Slade is much stronger, as shown infra.

The Court of Appeals made no reference whatever to this decision.

(c) *The judicial history of the Gaiennie Case in Louisiana.*

This case was followed in:

(1) *McCook* v. *Rebecca-Fabacher, Inc.* (Ct. App., 1st Cir.), 10 So. 2d 512, whereasto it was said:

> "Counsel for the plaintiff stress the case of Gaiennie *v.* Cooperative Produce Co., Inc., 196 La. 417, 199 So. 377, as authority in favor of their client. As a legal proposition that case is authority only to the extent that the contributory negligence of a driver who runs into the rear end of an unlighted truck parked on the highway at night presents a question of fact which has to be determined on the evidence produced in each particular case."

It will be noted that it was the 1st Circuit, Court of Appeals, which first established clearly that such matters were for the jury, and later, more or less, therefrom deviated until put back in line.

(2) *Babington* v. *Burris* (Ct. App., 1st Cir.), 7 So. 2d 650-653, likewise applied and followed it.

(3) In *Arceneaux* v. *Louisiana Highway Com.* (Ct. App., Orleans), 5 So. 2d 20, 22, that Court said:

> "The allegation that the defect was an obstruction beneath the surface of the highway has also been misconstrued. All that this means is that it was a hole and not an obstruction raised above the surface. The latter may easily be seen—the former only with difficulty, if at all. In making the allegation that the defect was an obstruction 'beneath' the surface, counsel, no doubt, were mindful of our language in German *v.* City of New Orleans, La. App., 3 So. 2d 181, 182, wherein we said: '* * * We have always recognized the distinction between striking an obstruction extending above the surface of the highway, which obstruction should be illuminated by headlights, and the running into a hole or depression in the road against which the lights did

> not shine and which might be no more noticeable than a shadow on the surface of the road. (Citing the Gaiennie and other cases).' "

We stress the color (yellow—R. 95) of the overturned truck, and its invisibility thereby (R. 102), being the equivalent of a depression under the Louisiana decisions, and that it was only 5½ feet high when lying on its side and the fog to this height was much denser (R. 103). There are so many theories of what might or might not be as to make this preeminently a jury question.

(4) In *Warnick* v. *Louisiana Highway Com.* (Ct. App., 1st Cir.), 4 So. 2d 607, 613, it is said:

> "The evidence shows that this truck had been used just prior to the day of the accident in the hauling of clay, dirt and gravel; though its original color was orange, on the night of the accident, due to its usage, it was a dull color and difficult to see at night. The back wheels of the truck recessed in from the body about 18 inches and the floor of the body was 4 feet from the ground, thus making it difficult for the lights of an automobile to disclose it before it was right on it, especially where the lights were dimmed in order to pass an on-coming car, as Ledet says was done in this case, which dimming had the effect of projecting the beam of the lights under the body of the truck. The color of the truck, according to the testimony vaguely blended with the pavement, and made it even more difficult for Ledet, in his approach, to discern it. The on-coming car also had some effect on Ledet's driving, impairing his vision momentarily. To take care of this impairment, Ledet says that he released his foot free from the accelerator, which no doubt had the effect of slowing down his speed."

Note, particularly, that the color of the overturned trailer, if it were visible, presented a similar problem.

(5) In *German* v. *City of New Orleans* (Ct. App., Orleans), 3 So. 2d 181, 182, that Court followed the rule whereon we rely, stating:

> "In Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, the Supreme Court held free from negligence an automobile operator who drove it into a canal under almost identical circumstances.
>
> "Counsel for defendant cites several cases in which it has been held that the driver of an automobile is negligent when he operates it at such speed as to render it impossible that it be stopped within the distance illuminated by its headlights. But this rule is not without exception, and it has never been held that under no circumstances may an automobile owner recover for damage sustained by his car if it appears that the operator could have stopped before striking an obstruction, or before running into a hole in the roadway. All of the surrounding circumstances must be investigated, and from them it can be determined whether the failure of the driver to stop constituted negligence on his part."

(d) *Further decisions.*

(1) *Peart* v. *Orleans-Kenner Traction Co.* (Ct. App., Orleans), 123 So., 822, 823, wherein there was a grade crossing accident, whereasto the Court of Appeals said:

> "A heavy fog prevailed. Fog constitutes the greatest menace of transportation, whether upon land or sea, and is the most feared of all perils that confronted the traveler. The 'pea soup' fogs of London are notorious for causing confusion and disaster in connection with pedestrian and vehicular traffic. Science, which in so many instances has relieved, or allayed, or mitigated the difficulties which beset, and ills which afflict, mankind, seems helpless and hopeless in this particular, and has contributed nothing with which to combat this terror of transportation. To one who has been at sea, as has the writer, during the prevalence of

> a dense fog for some 48 hours, and observed the anxious expression of the navigator, his ceaseless vigil upon the bridge of the ship, the constant blasts upon the primitive fog horn, the sole protection relied upon, and has witnessed the depression of the passengers and crew, no further demonstration of the danger of fog is necessary."

The Court then cited *The Martello,* 153 U. S. 64, and held the Traction Company responsible and the plaintiff, in driving on the track, not guilty of contributory negligence, saying:

> "It is contended that he either saw or should have seen, heard, or should have heard the electric car. To suppose that he saw or heard and continued on his way is to assume an intention to suicide or a state of imbecility. As to whether he should have seen or heard, and therefore his failure to do so was equivalent to not looking or listening under familiar principles of law, we observe that this rule has no application when surrounding circumstances excuse or prevent his failure to see or hear. Huddy on Automobiles (8th Ed.) Sec. 716; Loftus *v.* Pacific Electric Co., 166 Cal. 464, 137 P. 34.
>
> " 'If the driver of the hearse stopped, looked and listened when he reached the crossing and before going upon the first track, as he testified, and did not see, and could not see, any approaching train, and did not hear, and could not have heard, any signal or noise of a moving train, we are unable to see how the driver could be legally charged with contributory negligence.' " Betz *v.* I. C. R. R., 161 La. 929, 109 So. 766, 767. See, also, Townsend *v.* Mo. Pac. R. Co., 163 La. 872, 113 So. 130, 54 A. L. R. 538."

Visualize the defendant produced the fog wherein Slade could not see. Respondent, having blinded Slade, could not take advantage of his own wrong. Do not misconceive—plaintiff's contention is as hereinafter shown, that Slade

exercised due care, both (a) presumptively, (Point II, infra), and (b) in fact.

Strangely, the *Peart Case* is applied and followed in *O'Rourke* v. *McConaughey* (Ct. App., Orleans), 157 So. 598, 605, 606, and was utilized by the Court of Appeals, with deference, contrary to the later Supreme Court decision in the *Gaiennie Case,* to preclude recovery on the part of one who had run into a parked automobile, but not even the *O'Rourke Case* would pretend that where Shell Oil Company had blinded Slade, that the same corporation might attribute Slade's imposed blindness as his fault.

(2) *Wilson* v. *Great Sou. Tel. & Tel. Co.,* 41 La. Ann. 1041, 6 So. 781.

(3) *Woodley & Collins* v. *Schusters' Wholesale Produce Co.,* 170 La. 527, 128 So. 469.

(4) *Louisiana Power & L. Co.* v. *Saia, et al.* (Ct. App. La., Orleans), 173 So. 537.

(5) *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253.

(6) *Kirk* v. *United Gas Pub. Ser. Co.,* 185 La. 580, 170 So. 1.

(7) *Moncrief* v. *Ober,* 3 La. App. 660, wherein failure to see an unusual obstruction was held not to be contributory negligence.

(8) *Futch* v. *Addison et al.,* 12 La. App. 535, 126 So. 590.

(9) *Stafford* v. *Nelson Bros.,* 15 La. App. 51, 130 So. 234, 235.

(10) *Hanno* v. *Motor Freight Lines, Inc.,* 17 La. App. 62, 134 So. 317.

(11) *Castille* v. *Richard,* 157 La. 274, 102 So. 398, 37 A. L. R. 586.

(e) *Decisions of the Court of Appeals assumed to be relied on will be found not controlling.*

We have relegated the further distinguishing features to Appendix "E", whereto, if the Court be therein interested, reference is respectfully made.

(f) *The charge to the jury.*

This appears (R. 531). Respondents obtained about twenty charges, stating the alleged contributory negligence from every possible angle, and the jury found, as a question of fact, against each contention, which was, under the well-settled doctrine of the Supreme Court of Louisiana, proper, for defendant having created the fog wherein Slade could not see, and then invited trucks to turn to the left into its plant, coming from the East, as was the L. & A. truck, when thus invisible, thus wrought the wrong and Slade was free from contributory negligence as shown infra.

The Court said:

> "While the evidence was conflicting as to whether the heavy fog which admittedly was present was caused * * * by the defendant's discharge * * * into the highway canal, there was sufficient evidence to support the verdict of the jury that it was."

(g) *The burden of proof, presumptions and facts.*

(1) Burden of proof.

Having thus been guilty of negligence, the burden of proof as to contributory negligence rested on the defendant. *Buechner, et al.* v. *New Orleans*, 112 La. 599, 36, So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455; same principle, *Palmer* v. *Hoffman*, 63 S. Ct. 477, 87 L. ed. 427.

(2) Defendant being dead, there was as a presumption of "the instinct of self-preservation and * * * the * * *

exercise of due care under the circumstances." (*Aymond* v. *Western U. Tel. Co.*, 151 La. 184, 91 So. 671; same principle, *Baltimore, etc. R. Co.* v. *Landrigan*, 191 U. S. 461, 473, 48 L. ed. 262. "A person is conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm." *Lipscomb* v. *Publishing Corp.* (Ct. App., 2d Cir.), 5 So. 2d 45. Possibly this rule may be a little overstated.

(3) Arnold positively stated, as shown by the opinion of the Court (R. 602):

> "It is hard to tell how fast he was driving, but I know he could not have been driving on the shoulder more than ten miles per hour."

(4) Witness Finn swore positively, as quoted in the opinion, there was no visibility (R. 602).

(5) The majority opinion presumed to have Greer and Arnold, truck drivers, establish as a fact, Slade's speed. Greer claimed 20 miles per hour; Arnold, not more than ten. But both Greer and Arnold were directly in the path of the on-coming truck in defendant's fog, unable to see anything other than the approaching lights, and "An estimate made by the occupants of an auto towards which the other car is coming * * * has no probative value * * *." *Mutti* v. *McCall* (Ct. App., 1st Cir.), 130 So. 229, 230; approved, *Stout* v. *Nehi* (Ct. App., 1st Cir.), 146 So. 720, 724; *Campbell* v. *Haas*, 4 La. App. 435.

(6) The photographs transmitted for the most part reflect conditions after Slade's trailer, with its heavy load, had been pulled back from the cabin of the tractor wherein Slade was killed. What changes were thus wrought in the separation nowhere appear.

(7) Upon defendant rested the burden of proving Slade's contributory negligence. The photographs show a single

point of collision between the axles of Greer's overturned truck and the extreme right side of Slade's tractor. Slade's front wheels were slightly cut, but not straightened through the collision. Slade's motor was not driven back into his cab. He was injured not from the front, but from the back. By physics, the mass of the trailer and its load, 16,200 pounds, multiplied by its speed at the time of impact, would equal the work which might potentially be done before that mass was brought to rest. The principle of the lever—the trailer having three fixed points, the pin and its rear wheels,—multiplied at Slade's cabin the damage done, for, with a lever long enough, according to Archimedes, a mouse might move the world. The strength of the materials acted upon and the phenomena of these reactions were not in any wise attempted to be explained by the defendant, who submitted to the jury as factors upon which they could pass, these photographs, and so they did. Now, when the Court of Appeals attempted judicially to find the speed whereat Slade's truck was moving, they entered the field of physics, mechanics and higher mathematics, without adequate factors integrated thereinto by the evidence for any satisfactory answer to be given. This was not a case of a head-on collision, where, as a matter of common experience, the effects would clearly indicate the speed. In this record there is substantially no evidence of injury wrought by direct contact with Greer's truck, but the work was between Slade's tractor and Slade's trailer, whereasto, with deference, the Judges in the Court of Appeals could not possibly find the speed of Slade's truck, for the problem would be in the calculus, if mathematically solvable at all. Defendant, advisedly, did not along scientific lines attempt to make any proof by mechanical engineers. Presumptively this failure was a voluntary choice, indicating probably that if the attempt were made, the result would be adverse to de-

fendant. Had Slade's truck been constructed of a solid body so that the mass could not have moved forward, the force of the impact on Slade's motor was not such as to in any way injure him, at least so the jury could have found and did find, and having so done, there being no countervailing scientific data, the attempt of the Court of Appeals, with deference, was improper, for the answer attempted to be given was impossible of substantiation by evidence.

(8) What speed would have broken the connecting pin does not appear. It might have been that it would have broken—there being no proof thereasto, had Slade been going only one mile per hour, with the same result, but, assume that Slade's speed was absolutely unknown, there is not a line of evidence in this record that would show that the same result would not have occurred had Slade been moving at one mile per hour. The burden was directly upon defendant to show that the excessive speed caused the collapse. *Clisby* v. *M. & O. R. Co.*, 78 Miss. 937, 29 So. 913. Defendant has not in any way shown by any competent evidence that the collapse was due to excessive speed. Also see *O'Pry* v. *Berdon*, et al, (La. Ct. App.) 149 So. 287, 288, "We would not, however, infer that she was driving at an excessive rate of speed just because she was late on that occasion, and independently of any other proof. Cases cannot be decided by such inferences or assumptions.

"We must look to the testimony, facts, and circumstances, if there be any, for the solution of such questions, and cannot indulge in possibilities, probabilities, inferences, or assumptions of that character."

(9) It may well be that as to Slade's speed, the Federal law will control. See Point V herein.

(10) Other factors to be later discussed.

We, therefore, confidently submit that the jury verdict was proper, under the statutes of Louisiana, as construed by its Supreme Court, when the jury found the collapsing of this cab under the impact from the trailer and its load was directly attributable to the fault of Shell Oil Company, Inc., without contributory fault upon Slade's part. Defendant's instructions to the jury were more than liberal. In fact, with deference, our thought is that, with the record in the present shape, Slade's wife and child are entitled to a peremptory charge under the Louisiana law, but, if not, the majority opinion of the Court of Appeals violated clearly Rule 38, clause 5, of this Court by reason of having obviously not followed the law of Louisiana as announced by its Courts, and this opinion, with deference, is in palpable conflict therewith on a most important principle, for, in the Courts of Louisiana, this was a jury question and not one which a bare majority of the Judges could settle as a question of law.

POINT II.

If contributory negligence be a defense, which petitioners deny, the majority opinion in the Court of Appeals, in construing questions of Louisiana law, decided further substantial questions of State law in a way which conflicts with the applicable local decisions. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487; West v. American Tel. & T. Co., 311 U. S. 223, 85 L. Ed. 139, 144, 132 A. L. R. 956, and note (as to following intermediate court decisions). Six Companies v. Joint Highway District, 311 U. S. 180, 85 L. Ed. 114.

The majority opinion affirmatively disregarded, as therefrom appears, controlling Louisiana decisions, when Slade had been instantly killed and defendant's negligence affirmatively shown, in these particulars:

(a) The burden of proof as to contributory negligence rested on the defendant. *Buechner, et al* v. *New Orleans,* 112 La. 599, 36 So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455 (frequently approved, compare *Oliphant* v. *Lake Providence,* (Ct. App., 2d Cir.), 193 So. 516-524); *Palmer* v. *Hoffman,* 63 S. Ct. 477, 87 L. ed. 427.

(b) Slade being dead through defendant's wrong, as established by the majority opinion, that opinion disregarded the presumption in Louisiana law adequate to support a verdict from "the instinct of self-preservation and * * * the * * * exercise of due care under the circumstances." *Aymond* v. *Western U. Tel. Co.,* 151 La. 184, 91 So. 671; approved since, same principle, *Baltimore, etc. R. Co.* v. *Landrigan,* 191 U. S. 461, 473, 48 L. ed. 262. "A person is conclusively presumed to act in such a manner as will not unnecessarily expose himself to physical harm." *Lipscomb* v. *Publishing Corp.,* (Ct. App., 2d Cir.), 5 So. 2d 45.

(c) "An estimate made by the occupants of an auto towards which the other car is coming at night * * * has no probative value and usually amounts to a mere guess * * *." *Mutti* v. *McCall* (Ct. App., 1st Cir.), 130 So. 229, 230; approved, *Stout* v. *Nehi,* (Ct. App., 1st Cir.) 146 So. 720, 724; *Campbell* v. *Haas,* 4 La. App. 435.

(d) "Weight and sufficiency" were solely for the jury and not reviewable.

Galloway v. *United States,* No. 553, decided May 24, 1943, 11 Law Week 4395;

Bailey, Administratrix v. *Central Vermont Railway,* No. 640, decided May 24, 1943, 11 Law Week, 404.

With deference, the jury could have found, and, we submit, did find——

(1) That the fog did not begin "at least one-half mile from the place of the accident"; (R., 112)

(2) That Slade could not see the heavy fog; (R., 51)

(3) As shown in the opinion the fog (generated by defendant) at Norco, "When you get into it lies there like a thin coat of ice and the only way you can run through it is to stick your head out of the window."

(4) That moving as Slade was moving was not taking a chance.

The majority opinion lays particular stress upon *Lapeze* v. *O'Keefe,* (Ct. App., Orleans) 158 So. 36, but note——

(a) In the *Lapeze Case,* this was a natural fog wherefor the defendant was in no way responsible.

(b) That the decision was of the Court of Appeals, Orleans, and not by the Supreme Court.

(c) Recovery was allowed to a guest therein.

Frankly, likewise, the Court of Appeals in this connection sought to eliminate the emergency doctrine because of Slade's alleged failure to stop, that Court claiming this doctrine was not applicable (R. 605) "where the emergency is the result of the claimants previous contributory negligence," but, as shown supra, Slade (1) as found by the jury, under controlling Louisiana Supreme Court decisions, was not negligent; and (2) the Shell Oil Company has not produced a single case and, with deference, may not so do, where defendant, as here, has created the artificial fog wrongfully and then sought to use that thus wrongfully created as an excuse for escaping liability. No one may take advantage of his own wrong.

(5) When in following the course of three drivers who preceded him, Slade turned off on the shoulder just as they did, he was acting with due care.

(6) The Court of Appeals said (R. 603) "Slade did not see the truck."

Surely, if he did not see the truck and on account of the density of the fog could not see the truck, it was not contributory negligence to fail to do the impossible.

(7) With deference, there is no undisputed evidence as to the effect of the collision.

We, therefore, submit that in these particulars the Court of Appeals improperly disregarded Louisiana law, and therefor Certiorari should issue.

Point III.

There was the establishment by this opinion in the Fifth Circuit of an erroneous rule, conflicting with rules obtaining in this Court and in the other Circuits, when the Court of Appeals in this cause in the Fifth Circuit, by declaring that certain alleged facts were "without substantial conflict", reversed a jury verdict, when the verdict, as from the opinion affirmatively appeared, was based upon adequate credible evidence.

(a) This opinion clearly violates the Seventh Amendment.

Galloway v. *United States,* No. 553, decided May 24, 1943, 11 Law Week 4395;

Bailey, Administratrix v. *Central Vermont Railway,* No. 640, decided May 24, 1943, 11 Law Week, 404; *Jacob* v. *New York City,* 315 U. S. 752, 86 L. ed. 1166; *De Zon* v. *American President Lines,* 63 S. Ct. 814, 87 L. ed. 768, 775 (Mr. Justice Black's Opinion).

(b) "Weight and credibility are not reviewable" and the attempt in the Fifth Circuit so to do should be stayed.

The proper rule is found in *Morris* v. *Sells-Floto Circus, Inc.,* 4 Cir., 65 Fed. 2d 782. *Payne* v. *Colvin,* 7 Cir., 276

Fed. 15; Precisely this occurred in *Conway* v. *O'Brien,* 312 U. S. 492, 85 L. ed. 969. We concede that a review on Certiorari is not a matter of right but of sound judicial discretion, Rule 38, Clause 5, but under (b) thereof, when a Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings" this power is appropriate. *Conway* v. *O'Brien,* supra; (compare *Surgan* v. *Parker,* 181 So. 86, 89, Ct. of App. La.); *Tiller* v. *Atlantic Coast Line,* 63 S. Ct. 444, 87 L. ed. 453, reversing the Court of Appeals of the 5th Circuit, 128 Fed. 2d 420; *Halliday* v. *United States,* 315 U. S. 94, 86 L. ed. 711.

In the leading case of *Richmond & Danville R. R. Co.* v. *Powers,* 149 U. S. 43, 45, this Court said:

> "It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

As hereinbefore shown, there was here before the jury both (a) a conflict in the evidence, and (b) in the conclusions that might be therefrom drawn, and notwithstanding this affirmatively appears from the opinion of the majority of the Federal Court of Appeals itself, that Court assumed judicially to determine a question of contributory negligence.

Compare *Kreigh* v. *Westinghouse, etc. Co.,* 214 U. S. 249, 253, 258, "Weight and credibility are not reviewable", and when, contrary to the Constitution, the Court of Appeals of the Fifth Circuit disregarded controlling presumptions and misconceived Slade's rights to the extent above shown, then rectification for his widow and child is here their right.

Point IV.

Contributory negligence not a defense for liability arising from an absolute nuisance, and when the Court of Appeals precluded petitioners from relying upon this rule on remand, an important question of Federal law was assumed to be settled in an improper manner, whereasto rectification should be had here.

Under Rule 8, District Court Rules, plaintiff stated all facts in Count One, and thereon demanded judgment for $50,000, the injuria being (a) negligence, (b) absolute nuisance, and (c) wilful or wanton negligence. Plaintiff likewise added Count Two, reaverring facts by reference, and therein counted upon legal liability arising from nuisance alone. The District Judge directed a verdict for defendant on the Second Count for want of evidence to show the alleged nuisance, but submitted the cause on Count One to the jury, who found for the plaintiff. Plaintiff did not appeal from the direction of the verdict as to Count Two. Thereafter, the Court of Appeals reversed solely on the ground of alleged contributory negligence, and remanded for a new trial, wherein plaintiff is to be precluded from recovery by contributory negligence, though the legal liability may be predicated upon an absolute nuisance or under probable wilfulness or wantonness. *Evens* v. *Texas, etc. R.*, 5 Cir., 134 Fed. 2d, 275.

Therein, the Court of Appeals seriously erred, when the evidence clearly showed this liability, and should have remanded the case for a trial on all of the facts, giving plaintiff the right to recover under the facts, as pleaded and as proved, it being obvious that the creation and maintenance of an impenetrable fog is an absolute nuisance when committed on a transcontinental highway for many years.

After an elaborate trial, the jury having found for plain-

tiff as to the creation and maintenance of the fog, its existence is a factor that may not be disregarded, notwithstanding the District Judge (R., 531) said:

> "The second count is predicated upon the theory * * * (of) a nuisance there at Norco and as to the second count, I instruct you that you return a verdict for the defendant * * * *for the reason that there is no evidence of any such nuisance* * * * but the case will be submitted to you to determine the issues of whether or not the defendant was guilty of negligence in creating an artificial fog * * * whether or not that was the proximate cause of the death of the deceased."

Under Rule 8, facts were stated. Under that pleading, the evidence was introduced, competently showing the creation and maintenance of the fog on the public highway—of this there can be no doubt—and thereupon, as to the creation and maintenance of the fog, the jury found for plaintiff. Having so found, the creation and maintenance of the fog, as claimed and returned a verdict for plaintiff on the ground of creation and maintenance of the fog, plaintiffs did not appeal from the judgment in their own favor for the reason that, at the hands of the jury, they had received a verdict awarding full compensation for the wrongful creation and maintenance of the fog.

Now, under the law, if this wrong were an absolute nuisance, defendant could not escape on the ground of contributory negligence.

As said in 39 *Am. Juris.*, 475:

> "The cases are in substantial agreement that the ordinary rule of contributory negligence, which defeats recovery altogether in actions based on negligence as distinguished from nuisance, does not apply in case of an absolute nuisance. This view does not preclude the defendant from preventing or reducing recovery by showing that the damages sustained by the plaintiff were due, in whole or in part, to his own acts or con-

duct, or from defeating the action if the plaintiff and the defendant were joint wrongdoers, acting in concert, and not independently. But it has been held that where a nuisance causing a personal injury is not grounded on negligence, but is absolute, the fault on the part of the plaintiff which will bar recovery is fault so extreme as to be equivalent to invitation of injury, or, at least, indifference to consequences."

See *Hoffman* v. *Bristol,* 113 Conn. 386, 155 A. 499, 75 A. L. R. 1191, and, especially, the opinion of Judge Cardoza of the Court of Appeals, in *McFarlane* v. *Niagara Falls,* 247 N. Y. 340, 348, 160 N. E. 391, 393, 57 A. L. R. 16, wherein, for an absolute nuisance, liability should be unconditionally imposed.

That done by the revised rules was the elimination of technicalities and the establishment of absolute justice sofar as potentially possible. This precise question has not in this aspect been adversely decided by the Louisiana Courts, though there are decisions therein where this question was not raised, whereunder liability has been imposed as for negligence. This is a case of the first impression. An abutting owner, without excuse, absolutely blocks the Federal highway with an impenetrable fog. The issue here is, when defendant has so done and thus breached its absolute obligation, may it be relieved of responsibility, when plaintiff's sole default, if default it be, is attributable to an inability directly created by defendant's wrong? When plaintiff has such a right, did Rule 8 preclude plaintiff's reliance thereon, upon remand, when the jury, the District Judge and the Court of Appeals, all alike, held defendant guilty of creating and maintaining the fog upon the public highway? When defendant appealed from liability imposed by reason of the creation and maintenance of the fog, that Court should have remanded so as that plaintiff could have recovered upon the facts proved. Appeal by defendant from this part of the judgment should have that effect.

3 Am. Juris., 701, "Appeal & Error", Section 1195. Obviously, Slade will not have died in vain if by his death he can establish protection against such wrongful acts done by abutting owners.

POINT V.

Recovery for the wrongful death of a truck driver fully complying with I. C. C. safety rules for motor carriers may not be denied under State law.

Under the Constitution, power over commerce between the several states, was vested in Congress.

Upon the 27th day of May, A. D., 1939, the Interstate Commerce Commission, at its office, in Ex Parte No. MC-4, acting under the authority of the Motor Carriers' Act of 1935, 49 Revised Stat., 543, 49 U. S. C. A., Section 304 (a) (1) and (2), with respect to qualifications and maximum hours of service of employes, and safety of operation and equipment, of common carriers and contract carriers by motor vehicle in interstate commerce, prescribed Safety Regulations, whereof judicial notice will be taken.

The Court of Appeals properly found these rules applicable, referring to Rule 2.31 in the opinion, whereby it is provided:

> "Extreme caution in the operation of motor vehicles shall be exercised under hazardous conditions such as snow, ice, sleet, fog, mist, rain, dust, smoke or any other condition which adversely affects visibility or traction, and speed shall be reduced accordingly,"

but the jury found Slade had properly complied therewith, and, with deference, the Court of Appeals could not reverse therefor, as above shown, and committed fundamental error when it reversed by reason of its conception of the Louisiana law, the judgment rendered by the District Court upon the jury's verdict. Under the Federal law, Slade, as the

jury found, had done his full duty. Having so thus done, could his widow and child have from them taken, assuming the State law to be as held by the majority opinion, the right to recover, which was vouchsafed to Slade upon his compliance with the due care prescribed by the Interstate Commerce Commission.

Compare *Terminal R. Asso.* v. *Brotherhood,* 63 S. Ct. 420, 87 L. Ed. 371, wherein it is indicated that had the Interstate Commerce Commission acted as they have here, then Slade's rights would have been founded thereon, this being, under the Constitution, the supreme law of the land. Compare *Illinois Com. Com'n* v. *Thompson,* 63 S. Ct. 834, 87 L. Ed. 783; *New York C. R. Co.* v. *Winfield,* 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045; *New York Central R. Co.* v. *White,* 243 U. S. 188, 378 Ct. 247, 61 L. Ed. 667.

In *Brannon* v. *Rickenbacher Transp., Inc.,* 43 Fed. Supp. 893, the District Judge held that such an employe was not within the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, 53 Revised Stat. 1404.

Under the Motor Carrier's Act, 49 Stat. at Large, 543, 49 U. S. C. A. Sec. 301, it was held that under *State ex Rel* v. *Kelly,* 192 Wash. 394, 74 Pac. (2d) 16, there was no regulation of employes engaged in interstate commerce, and hence the State Workmen's Compensation Act controlled, but as remarked in note, 83 L. Ed. 1179:

> "In other cases, however, which hold that the Federal act does not divest an employee of his rights under state compensation acts with respect to injuries received before the enactment of the Federal act, the inference seems to be that as to injuries occurring after its effective date the Federal Motor Carrier Act operates to oust the state compensation boards of their jurisdiction over employees engaged in interstate motor transportation. Ben Wolf Truck Lines *v.* Bailey (1936) 102 Ind. App. 208, 1 N. E. (2d) 660; Hartzfeld *v.* Block

(1937) 127 Pa. Super Ct. 323, 193 A. 386; Buckingham Transp. Co. *v.* Industrial Commission (1937) 93 Utah, 342, 72 P. (2d) 1077, supra, under heading 'Retroactive nature.' "

Note Rule 2.01:

(R. 81) "Every motor carrier and his or its officers, agents, employees, and representatives concerned with the transportation of persons or property by motor vehicle shall comply with the following regulations and shall become conversant therewith."

Note Rule 2.061:

(R. 81) "No motor vehicle shall be driven at a speed greater than is reasonable and prudent, having due regard to weather, traffic, intersections, width and character of the roadway, type of motor vehicle, and any other conditions then existing."

As to State speed limits, see Rule 2.062.
By Rule 2.11:

"Every motor vehicle shall be driven as far to the right side of the traveled portion of the highway as is practicable."

Rule 2.22 provides:

(R. 82) "No motor vehicle shall be stopped, parked, or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. * * *"

As counsel understands Slade's action, he was attempting to comply with these safety rules, which he assumed to require that he should turn off of the paved portion on to this shoulder when slowing down to leave the traveled por-

tion of the highway clear. If this be, as we insist it was, the proper thing to have done under these safety rules, then, when the Court of Appeals sought to take from Slade's widow the right to recover by integrating the Louisiana law as in conflict with Slade's right, which, with deference, it was not, then to the extent that Slade complied with the requirements of the Interstate Commerce Commission, the State of Louisiana could not say that he had done wrong and preclude Mrs. Slade from recovering when that by him done accorded with the Federal requirements. The State of Louisiana may only act when the Interstate Commerce Commission has not acted. There were four trucks moving in interstate commerce. The truck of Greer that overturned was so moving, and this truck by so thus overturning brought about the collapse of Slade's cab, and when the Interstate Commerce Commission has said what these interstate truck drivers must do, the State of Louisiana may not require those truck drivers to do any other or different thing.

Compare *McCullough* v. *Maryland*, 4 Wheat. 427; *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Brown* v. *Maryland*, 12 Wheat. 420, 6 L. Ed. 678. Compare *Federal Power Com'n* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. Ed. 1037; *Illinois Natural Gas Co.* v. *Central Ill. Pipe Serv. Co.*, 314 U. S. 498, 86 L. Ed. 371; *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572, 86 L. Ed. 1682.

With deference, as above shown, the majority opinion of the Court of Appeals incorrectly assumes to overturn the verdict of the jury which had found compliance with these safety rules of the Interstate Commerce Commission, and having found that thereunder Slade was not guilty of fault that would preclude, the Court of Appeals could not give effect to a rule of law establishing by the State of

Louisiana in conflict with that established by the Interstate Commerce Commission to take from Slade that to Slade given under the Interstate Commerce Commission's rules.

Further, compare 42 Stat. 216, 23 U. S. C. A., Sec. 19, whereunder the Secretary of Agriculture was likewise given certain authority as to rules, to insure "the safety of traffic thereon."

Accordingly, we have here a case of outstanding importance of first impression involving the safety of truck drivers moving in interstate commerce over interstate Federal highways, wherefor Certificates of Convenience and Necessity have properly issued, and where labor conditions and equipment have been extensively regulated, and exclusively the Interstate Commerce Commission prescribed how these interstate truck drivers shall drive when so thus traveling in interstate commerce.

So that, when the Court of Appeals subordinated these paramount rules to Louisiana law by reason of assumed conflict which the Court of Appeals found therein, it wrongfully violated thereby the commerce clause and raised a question of that character which this Court should review, being of paramount public importance.

Conclusion.

It may be, as was done in *Conway* v. *O'Brien*, 312 U. S. 492, 85 L. Ed. 969, that the Court will not need to determine this question as to Interstate Commerce if they find, as find they should, that under the law of Louisiana, which was obligatory upon the Court of Appeals, Slade did not defeat his right of recovery by that by him done or left undone. There is also this other outstanding important question under Rule 8, whereby fundamental wrong will be wrought unless rectification is here had.

The writ should be issued upon every ground prescribed, with deference, in Rule 38, paragraph 5 (b) of the Supreme Court.

Respectfully,

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APPENDIX "A".

Act No. 286 of 1938 of Louisiana Title II, Rule 15 provides:

"(A) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; provided, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen (15) feet upon the main traveled portion of said highway opposite such standing vehicle shall be left free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred (200) feet in each direction upon such highway; provided, that if such vehicle is left parked, attended or unattended, one half hour after sunset or one half hour before sunrise, the person

Safety Regulations, Interstate Commerce Commission Safety Regulations, Part 2—Driving of Motor Vehicles:

2.22. Vehicles When Stopped Must Not Interfere With Other Traffic. No motor vehicles shall be stopped, parked, or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. When conditions make it impracticable to move the motor vehicle from the traveled portion of the highway, every effort shall be made to leave all possible width of the highway opposite such standing motor vehicle for the free passage of other vehicles, and care taken to provide a clear view of such stopped motor vehicle as far as possible to the front and rear. (See also Rule 2.24.)

stopping it or parking it at that time or place, or causing it to be so stopped or parked or left standing, shall display appropriate signal lights thereon, sufficient to warn approaching traffic of its presence thereat. * * *"

APPENDIX "B".

Gaiennie v. *Cooperative Produce Co., Inc., et al.*, 199 So. page 377—No. 35877—Supreme Court of Louisiana—November 4, 1940. Rehearing Denied Dec. 2, 1940.

Questions Certified from Court of Appeal, First Circuit.

Suit by Charles S. Gaiennie against the Cooperative Produce Company, Inc., and another to recover damages for personal injuries. Judgment for plaintiff, and defendants appeal. On questions certified by the Court of Appeal. Questions Answered.

PONDER, Justice:

"This case is certified to us by the Court of Appeal for the First Circuit under the provisions of Article 7, Section 25, of the Constitution of this State, for instructions.

"In this suit the plaintiff is seeking damages for personal injuries, etc., arising out of an accident in which an automobile driven by the plaintiff, Charles F. Gaiennie, and a truck driven by Frank Monte, were involved. The suit is directed against the defendant and its public liability insurance carrier, the Massachusetts Bonding and Insurance Company. The case is pending on appeal in the Court of Appeal for the First Circuit from a judgment adverse to the defendant.

"The Court of Appeal states that it has no difficulty in reaching the conclusion that the driver of the truck of the defendant company was guilty of gross negligence, but entertains doubt, under the facts and circumstances whether

or not the plaintiff was guilty of such contributory negligence as to bar his recovery. The Court of Appeal desires answers to the following two questions: (1) What is the general rule that should be applied under the following and a similar state of facts; (2) Under the facts herein outlined, was the plaintiff guilty of such contributory negligence as to bar his recovery? The Court of Appeal in certifying the questions has given its examination of and conclusions upon the matters submitted. After examining the discussion of the case by the Court of Appeal, it is apparent that court is of the opinion that the judgment of the lower court should be affirmed.

"The statement of facts, as found by the Court of Appeal, is as follows: On the evening of Monday, October 4, 1937, between 8 and 8:30 o'clock, Frank Monte, employed by the Cooperative Produce Co., Inc., and driver of one of its trucks, was returning to Baton Rouge on Highway 71 after a day's work which took him to Opelousas and other points as far north as Marksville, Louisiana. The truck he was driving that day was not the one he drove regularly but one which his employer used locally in Baton Rouge. It was a Chevrolet truck, 1937 Model, having a stake body painted blue. He had a regular helper to go on his delivery trips with him, but on that day this helper did not show up so he took a negro boy with him as his helper. This boy has since died and his version of what happened on the night of the accident has never been given.

"Highway No. 71 in this section of West Baton Rouge Parish is straight for a distance of several miles. On reaching a point approximately ten miles west of Port Allen, the truck which Monte was driving ran out of gasoline and it was necessary for him to stop. The entire width of the highway at that point is approximately 52 feet, measured as follows: 20 feet of paved slab, 26 feet of shoulder on the north side, and 6 feet of shoulder on the south side. As Monte was traveling east, the south was to his right and the north to his left. He made no attempt to park the truck on the wider shoulder on the north because of traffic moving on the highway at that moment. He did park on the south side, but did not clear the paved portion of the highway,

one of the front wheels of the truck resting on the right shoulder and the other on the paved portion of the road, and both rear wheels resting on the pavement. The body of the truck extended at an angle across the paved slab of the right traffic lane for some five feet from the south edge thereof.

"There is some doubt arising out of the testimony that Monte left the headlights of the truck on after stopping, but assuming that they were burning, they naturally projected a beam of light directly in front of the truck in the manner in which it was parked and afforded no warning of its presence on the highway to traffic that was approaching it from the rear. The preponderance of the testimony shows that the tail and side clearance lights were not burning, and admittedly, there were no flares placed on the highway and no flares were even in the truck. Monte sent the helper to the nearest filling station for gasoline and he remained with the truck. Monte had a flash or searchlight with him but did not use it in trying to warn approaching traffic. Therefore, to traffic coming from the west, this truck, parked on a portion of the paved slab of the highway in the dark, was an object of peril placed and permitted to remain there through the negligence of Monte, who, it is admitted, was acting within the scope of his employment.

"Within a period of time which is not fixed, but which we estimate to be several minutes, during which Monte, the driver of this truck, occupied himself in a rather indefinite manner, as far as his testimony shows, in looking for flares in the truck, Charles S. Gaiennie, the plaintiff herein, approached the truck from the west in a Chevrolet coach belonging to his employer and which he was driving at a rate of speed estimated to be from 35 to 40 miles per hour. He kept his car in the south lane of travel on the paved portion of the highway which was to his right, and as he neared the point where the truck was parked he began meeting cars going west or in the opposite direction to that in which he was travelling. There were four or five cars following each other and all of them with the headlights burning so brightly as to dazzle his eyesight inter-

mittently. He dimmed the headlights on his car and slowed down its speed to between 20 and 25 miles per hour.

"The effect of the dazzling lights from the cars he was meeting was that he was not blinded by them but his vision was momentarily and intermittently impaired to the extent that instead of having a full view of the paved highway ahead of him as he had had without such impairment, his view of the pavement was limited to approximately 18 or 20 ft. within which distance he could, at the speed he was going, bring his car to a stop. As he had dimmed the headlights on his car, that had the effect of tilting the beam of light downward at an acute angle on the pavement in front of him, this also causing some restriction in his sight of the pavement as far as distance was concerned.

"Plaintiff felt safe in proceeding on the highway under the circumstances, and he did. As he passed the last of the series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car, in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. The rear body of the truck was some 3 or 4 feet above the ground and extended back some four feet over the rear wheels, so that when plaintiff dimmed his lights the tilted beam of his headlights projected under the truck making it that much more difficult for him to see it.

"As the truck loomed in front of him he made an effort to avoid running into it by applying his brakes and pulling his car to the left in order to pass around it. He was too close then, however, to avert a collision. The right front end of his car struck the rear left end of the truck and because the body of the truck stood lower from the level of the pavement than the radiator and hood of the car by some two to four inches, the front end of the car was pushed under the truck and the upper parts of the car which are made of lighter material such as the radiator, the hood and cowl were badly crushed. The bumper which is made of stronger steel was bent in a sort of "U" shape and the frame to which the motor and body are attached was

slightly bent out of line on one end. There is some doubt whether the motor was pushed back but it is shown that the cowl and instrument board in front of the driver's seat were smashed and driven in. The damage to the truck apparently was negligible. It is doubtful whether the impact caused it to be moved forward any distance at all.

"The accident involved herein occurred during the year 1937, prior to the enactment of Act No. 286 of 1938. The law applicable to determine whether or not the plaintiff was guilty of negligence would be Act No. 21 of 1932, Section 3, Rule 4, paragraph (a), which makes it unlawful for any person to drive a motor vehicle upon the roads and highways of this State at any other than a careful, prudent, reasonable and proper speed, having due regard to the traffic, surface and width of the highway, the location and neighborhood, and any other conditions or circumstances then existing. The burden of proof is on the defendant to show that the plaintiff was negligent and that his negligence contributed to his injury. Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270; Washington & Georgetown R. Co. *v.* Harmon's Adm'r, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284. This doctrine was approved in Loprestie *v.* Roy Motors, Inc. et al., 191 La. 239, 185 So. 11.

"In the case of Woodley & Collins *v.* Schusters' Wholesale Produce Co., Inc., 170 La. 527, 128 So. 469, in discussing whether or not the driver of an automobile should be deemed negilgent for failing to slow down, we stated that it depended on the circumstances of the particular case, and that it is not easy, nor safe, to lay down a hard and fast rule on the subject. The difficulty in laying down a hard and fast rule is that the act provides that the conditions and circumstances must be considered as well as the traffic, surface and width of the highway, and the location of the neighborhood. Such being the case, the particular facts of each case must be considered in arriving at a conclusion, and it would not be safe to lay down a hard and fast rule for that reason.

"In the case of Louisiana Power & Light Co. *v.* Saia et al., La. App., 173 So. 537, the court stated in effect that a great many cases have held that the failure of the driver of a

moving vehicle to observe an obstruction—usually in the form of a stationary vehicle—constituted such negligence as would prevent recovery, and cited many cases to that effect; but, the court aptly said in effect that this result had not been reached regardless of surrounding circumstances and facts. In fact, the courts have been careful to say in each case that no circumstances were involved that would justify the failure of the driver to see the object ahead. It would appear that this is a reasonable interpretation of the provision of Act No. 21 of 1932, aforementioned, because it specifically provides that the conditions and circumstances must be considered. While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. Jacobs *v.* Jocobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253.

"In Kirk *v.* United Gas Public Service Co., 185 La. 580, 170 So. 1, this court stated that the general rule is not inflexible, and that its application depends on the facts and circumstances of each case. Many cases were cited therein where the rule was relaxed and the driver of the automobile exonerated from negligence.

"Many cases have held to the effect that ordinarily a motorist is negligent in not slowing down to a speed at which he can stop instantly when blinded by headlights. However, a careful examination will reveal that the circumstances and facts of each case were taken into consideration in arriving at a conclusion. Also, it has been held in many cases that a motorist was guilty of negligence because he failed to see the obstruction or object in time to stop before colliding with it; but, the facts and circumstances of each case have been considered in determining whether or not the motorist had sufficient reasons for not seeing the object or obstruction in time to stop.

"In the case of Moncrief *v.* Ober, 3 La. App. 660, it was held that a small cable stretched above the surface of a public road was such an unusual obstruction that the failure of a motorist to detect it did not indicate negligence on his part.

"In the case of Kirk *v.* United Gas Public Service Co., supra, wherein a motorist saw an object ahead of him in the road which he thought was a shadow or repaired patch in the road and did not observe that it was a dead yearling until a moment before it was struck, when it was too late to stop, we arrived at the conclusion that it would be unreasonable to hold the motorist negligent in failing to see the yearling sooner than he did.

"From the facts certified it appears that the plaintiff was driving at a moderate rate of speed, between 40 or 45 miles an hour, on an open highway, with his car properly lighted, and that he slowed down to between 20 and 25 miles an hour on meeting the approaching cars. There is nothing to indicate that the neighborhood within the vicinity was thickly populated. There is nothing in the facts to indicate that the location was such that the plaintiff would expect cars to be parked on the highway, as would be expected where the location was thickly populated. It appears that the plaintiff was traveling at such a speed, after he slowed down, to enable him to meet an ordinary emergency under the circumstances. If the truck had been parked entirely on the pavement the plaintiff could more easily have seen the wheels and running gear, but the truck was parked at an angle on the edge of the highway with the body extending out into the road some three or four feet above the ground, and some four feet beyond the rear wheels. It was the duty of the plaintiff when meeting the approaching cars to dim his lights. When he dimmed the lights the beam was necessarily thrown down on the highway, causing it to shine under the rear end of the truck, which was protruding some distance over the road. Under these circumstances, we do not think the plaintiff was negligent in failing to see the truck sooner than he did.

"For the reasons set out above, our answer to the first question is that we cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case.

"Our answer to question two is that under the facts outlined the plaintiff was not guilty of contributory negligence."

APPENDIX "C".

Rules of Civil Procedure for the District Courts of the United States.

Rule 8. General Rules of Pleading.

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * * * * * *

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

The 5th Circuit, in Hollander *v.* Davis, 120 Fed. (2d) 131, 133, construes this rule as follows:

"The sharp and technical condemnation of pleading that once obtained does not now exist. If the complaint states fully and simply a cause of action it is sufficient; and if such narrated facts measure to gross negligence or wilful and wanton misconduct it meets the requirements of the Florida automobile guest statute. Rule 8, Rules of Civil Procedure for District Courts, 28 U. S. C. A. following Sec. 723; Holtzoff, New Federal Procedure and the Courts, Page 24."

APPENDIX "D".

SHELL OIL CO., INC., v. SLADE ET AL.

No. 10353

CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, FEB. 2, 1943

Rehearing Denied March 12, 1943

1. Automobiles [key symbol] 306(2)

In action for death of truck driver in collision in fog with overturned truck, evidence supported verdict finding that fog was caused or contributed by defendant's discharge of hot water into highway canal.

2. Automobiles [key symbol] 284, 286

Under Louisiana law, motorist entering a fog so dense as to obstruct vision must stop until he is sure of his way, or, if he drives into it, he must proceed at such a speed as will permit him to stop in distance within which he can see objects in his way.

3. Automobiles [key symbol] 306(8)

In action for death of truck driver in collision with an overturned truck in a fog which was allegedly created by negligent discharge by defendant of hot water into highway canal, evidence that decedent was warned of fog by preceding truck, and that decedent drove into fog at a speed which would not permit him to stop in distance within which he could see an object in front of him, under Louisiana law established decedent's contributory negligence as a matter of law.

4. Automobiles [key symbol] 284

Where undisputed evidence disclosed that deceased truck driver had timely warning of fog which concealed overturned truck before he drove into such fog and collided with overturned truck, there could be no recovery for death of truck driver either on theory of negligence of oil company

in creating fog by discharge of hot water into highway canal or on theory of "sudden emergency".

See Words and Phrases, Permanent Edition, for all other definitions of "Sudden Emergency".

5. Negligence [key symbol] 72

Defense of "sudden emergency" is never available where that emergency is result of claimant's previous contributory negligence.

HOLMES, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Mississippi; Sidney C. Mize, Judge.

Action by Mrs. Leslie F. Slade and others against the Shell Oil Company, Incorporated, to recover for death of named plaintiff's husband when his truck collided with an overturned truck in a dense fog which was allegedly created by defendant's discharge of hot water into a highway canal. From a judgment for plaintiff, defendant appeals.

Reversed and remanded.

Thomas H. Watkins, of Jackson, Miss., William Saunders Henley, of Hazlehurst, Miss., and Harry McCall, of New Orleans, La., for appellant.

Ross R. Barnett and P. Z. Jones, both of Jackson, Miss., and Frank F. Mize, of Forest, Miss., for appellee.

Before Sibley, Hutcheson, and Holmes, Circuit Judges.

HUTCHESON, Circuit Judge.

The complaint for death damages resulting from an automobile collision in a fog was in two counts. The first count charged negligence, the second maintenance of a nuisance. The gravamen of both counts was that: *for a long period of time prior to the injury, defendant had permitted the discharge from its plant into an open drainage ditch and thence into a canal along the side of the highway* of large quantities of very hot water with the result that in the cool of the evenings and early mornings they created dense and heavy fogs immediately above the paved highway; and that plaintiffs' intestate, driving along it at about 7:15 on the morning of March 4, 1940, with his vision wholly obscured on said occasion by said dense and heavy fog and cloud *so that*

he could not, and did not, see it, had run into and against a truck which had been overturned on the shoulder of the highway.

The defendant, admitting that at the time plaintiffs' decedent came to his death there was a dense fog over the highway which wholly obscured the vision of all persons driving vehicles thereon, alleged that the death was caused by the decedent's own contributory negligence in driving into the fog at a rate of speed such that he could not stop within the range of his vision.

[1] Tried to a jury, while the evidence was conflicting as to whether the heavy fog which admittedly was present was caused or contributed to by defendant's discharge of hot water into the highway canal, *there was sufficient evidence to support the verdict of the jury that it was.* The evidence, however, as to the blinding nature and extent of the fog and as to how the accident came about was without substantial conflict. All of the witnesses put on by plaintiff agreed that a thin fog began at least one-half mile from the place of the accident *and that when the drivers entered the thin fog they could see a heavy fog ahead;* that the line between the thin fog and the thick fog was like looking out of a lighted room into a dark one;[1] that the thick fog was

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[1] As Rogers described it: "It looked like a cloud sitting down there and when you ran into it you had to be pretty cautious. There was a spot in there about 100 feet or so that was extremely thick. I knew I was taking a chance that morning when I ran into that fog." Greer testified: "I was about one-half mile from the thick fog when I looked in my rear view mirror and saw Slade coming about 250 yards behind me. I was going about 35 miles per hour. As I began to slow down, I blinked my lights and then I ran into a thick fog that cut off vision altogether. When I hit the thin fog, I was going about 20 or 25 miles per hour and I was slowing down all the time. My vision became obstructed when I hit the thick fog. When I was in the thin fog, the thick fog did not look like fog to me. It looked like smoke over the road and you couldn't tell what distance it was. Driving into the fog you would get into it before

like a wall in front of them. All agreed that in driving through the fog without coming to a stop or slowing down so they could stop immediately, they were taking a chance. *All agreed that in the thick fog the person turning off the highway onto the shoulder could not see obstructions there.* All agreed that Slade did not see the truck and ran into it at a speed estimated by Greer at 20 and by Arnold at 10 miles per hour. The undisputed evidence as to the force of the collision, and the photographs showing the condition of the trucks after the collision, established that heavily loaded as it was, a combination tractor and semi-trailer,

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you could see it. I knew where I was and I had seen fog awful thick rising from that ditch." He further testified that as he got into the thick fog, he suddenly came on a parked truck, that he went around the truck on the shoulder of the road and ran into another truck and turned over to avoid hitting it; that Slade came on following the route he had taken and ran into the back end of his truck, running about 46 feet after he made his right turn off the paved road, and that when he hit the truck, Slade was making about 20 miles per hour; that Slade had driven about 90 feet from where Greer went into the thick fog; there was nothing between him and Slade to keep Slade from seeing his truck as it disappeared into the fog. "When I got into the thick fog, he was about 250 yards behind, and he could have stopped three or four times in that space. He could have slowed down to 5 miles an hour after seeing me disappear into the fog and if he had been going at that rate he could have stopped in five feet." That he (Greer) could not see in the fog over 10 or 15 feet, and that if Slade had brought his truck down to 5 miles an hour, there would have been no reason for his running into Greer. He testified that he did not change gears. He did not know whether Slade did or not. That he knew he was taking a chance in driving into that fog at 20 or 25 miles an hour. That Slade was one of the best drivers they had and one of the fastest. Finn testified that when he first got into the fog he could see, but after a certain distance the visibility was nil; that before he got into the fog, he could see the bank of fog across the highway as he approached it. The fog was so

the tractor weighing 5400 pounds, the trailer weighing *7200* pounds and carrying a *9000 pound load,* and therefore, much more difficult to stop than an empty truck, Slade's truck was running much too fast for safety. Notwithstanding these undisputed facts, the district judge, instructing a verdict for defendant on the nuisance count, denied its motion to instruct for it on the negligence count. There was a verdict on this count for plaintiff for $35,000, a credit on it of $3,300 received as workmen's compensation, and a re-

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thick that there was no visibility as far as driving was concerned. "You couldn't see into the fog, you would have to stick your head out of the window and look where the black line was so you could go on through." Arnold, the truck driver who was run into by Greer, testified that after he and Greer had had their collision he saw Slade coming. "I was in the cab of my truck. My truck was still. When I saw Slade coming the Greer truck had not turned over altogether. Slade came along and hit us, and we all went down." As to Slade's speed, he said, "It is hard to tell how fast he was driving, but I know he couldn't have been driving on the shoulder more than 10 miles per hour." He also said that Greer and Slade were driving at the same rate of speed, and that he couldn't see whether he was going 10, 15 or 20 on the highway, that off the highway he couldn't have been going more than 10 miles an hour. As to the collision, he said, "A man came over and clipped me and had me up on two wheels. I watched and seen the other one coming. I thought, 'My God, he won't stop, he will never see us.' He ran on up just like you would run into a dark room and run into a table." As to the fog, he testified: "The fog was a heavy one and you couldn't see anything. When I first got into it it was a little thick, and I said to myself, 'Get off the highway and play safe', and I did. When you hit the thin fog you could see the wall of the thick fog in front of you. There is always a good little mist before the heavy one. The little mist ain't very far away from the big one. I knew where I was, and I always used caution. The fog at Norco when you get into it lies there like a thin coat of ice and the only way you can run through it is to stick your head out of the window."

quirement by the judge that plaintiff remit another $3,000.

Defendant has appealed, assigning numerous errors; that a verdict should have been instructed for it because (1) the evidence failed to show defendant was guilty of negligence proximately causing the injury and (2) that it showed contributory negligence as a matter of law; that the verdict was so large in amount as to evidence passion and prejudice; and that the court had erred in the admission and rejection of evidence and in giving and refusing instructions.

Here, not waiving any of its points appellant vigorously urges upon us (1) that the fog was not due to any negligence of defendant, but if it was, the fog was merely a condition and not a proximate cause of the collision, and (2) the deceased was himself guilty of contributory negligence. [2-5] Since we are quite certain that but for Slade's contributory negligence, the injury would not have occurred and that defendant should, therefore, have had an instructed verdict on this ground, we find it unnecessary to consider the other points appellant urges upon us. It is settled law in Louisiana that one *entering a fog,* such as the one pleaded and testified to here, must stop until sure of his way, or if he drives into it, he must proceed at such a speed as that he can stop the car *in the distance within which he can see objects in his way.* It will not do for such a one to say, as here, that he was driving 20, 15 or even 10 miles an hour. The evidence establishes that in the fog *he did not see and could not see the object he ran into within* the distance within which he could stop his truck, but more than that, it shows that, fully warned by the fog in the road, by Greer's blinking his lights at him and by Greer's disappearance in the fog, he took the hazardous course not of turning off onto the shoulder *to stop, but of trying to drive around the cars in the road by using the shoulder when in the fog there was no way by which he could determine whether other cars were parked there or whether there were other obstructions in his way.* That Slade drove into a dense fog where he could not see his way and was the author of his own death, both the pleadings and the evidence leave in no doubt. Plaintiffs pleaded that "the vision of said Slade

was wholly obscured on said occasion by said dense and heavy fog and cloud, and in such fog or cloud he was unable to turn the truck toward his right or left and avoid running into the overturned truck, and was unable to stop the truck in sufficient time to avoid a collision and head on crash with the overturned truck." The evidence establishes that this was so. Under these undisputed facts it will not do for plaintiffs to plead and claim that in driving as he did, Slade was in the exercise of due care. For it is settled by a long line of Louisiana cases[2] that he was guilty of contributory negligence as a matter of law and may not recover for injuries resulting therefrom. Appellees' insistence, with ci-

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[2] O'Rourke *v.* McConaughey, La. App., 157 So. 598; Dominick *v.* Haynes Bros., 13 La. App. 434, 127 So. 31; In Castille *v.* Richards, 157 La. 274, 102 So. 398, the court held that where two automobiles were coming into a cloud of dust it was inexcusable negligence for the drivers of the automobiles not to have come to a full stop until the dust had subsided. In Raziano *v.* Trauth, 15 La. App. 650, 131 So. 212, 213, the Court said: "The fact that he did not see the truck until so close upon it cannot excuse him, for he must be held to have seen what he should have seen * * * and, if the fog affected his vision, he should not have maintained a speed of 20 miles an hour." Rector *v.* Allied Van Lines, La. App., 198 So. 516, holds flatly that the presence of smoke or dust on the road is not the proximate cause of an injury if such fog covered the highway, but the failure to exercise care in driving into the fog is. Other cases in point are Maggio *v.* M. F. Bradford Motor Exp., La. App., 171 So. 859; Inman *v.* Silver Fleet, La. App., 175 So. 436; Hutchinson *v.* T. L. James & Co., La. App., 160 So. 447; Penton *v.* Sears, Roebuck & Co., La. App., 4 So. 2d 547; and Russo *v.* Aucoin, La. App., 7 So. 2d 744. This court has uniformly taken the same view, Smith *v.* Southern Railway Co., 5 Cir., 53 F. 2d 186; Brown *v.* Southern Railway, 5 Cir., 61 F. 2d 399, Cf. Thompson *v.* City of Houma, 5 Cir., 76 F 2d 793; C. C. Moore *v.* Hayes, 5 Cir., 119 F. 2d 742.

tation of cases,[3] none, however, from Louisiana, to the effect that it is negligence to envelope a highway with fog or smoke caused by the starting of negligent fires or the sudden eruction of steam, cinders or dust, and that one injured by that negligence concurring with the negligence of another may recover, will not avail them here. For in none of those cases, as here, was there contributory negligence completely barring recovery. Nor may appellees rely, as they seek to do, upon the doctrine of sudden emergency both because the evidence establishes without dispute that the deceased had full warning of the dangers in ample time to provide against them and because the defense of sudden emergency is never available where that emergency is the result of the claimant's previous contributory negligence.[4] Slade had had long

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[3] Keith *v.* Yazoo & M. V. R. Co., 168 Miss. 519, 151 So. 916; Southern Cotton Oil Co. *v.* Wallace, 27 Ga. App. 415, 108 S. E. 624; McCombs *v.* Southern Railway Co., 39 Ga. App. 716, 148 S. E. 407; Farrer *v.* Southern Railway Co., 45 Ga. App. 84, 163 S. E. 237; Ryan *v.* First National Bank & Trust Co., 236 Wis. 226, 294 N. W. 832; Pisarki *v.* Wisconsin Tunnel & Const. Co., 174 Wis. 377, 183 N. W. 164; Pitcairn et al. *v.* Whiteside, Ind. App., 34 N. E. 2d 943.

[4] Walker *v.* Southern Advance Bag & Paper Co., La. App., 150 So. 865; Myers *v.* Sanders, 189 Miss. 198, 194 So. 300; Harper *v.* Holmes, La. App., 189 So. 463; Prevost *v.* Smith, La. App., 197 So. 905; all holding that the plea of sudden emergency may be availed of only when he who pleads it is himself free from fault and has not contributed to the creation of the emergency. In Pendola *v.* State, La. App., 4 So. 2d 28, the court, denying the application of the rule, said that if any emergency arose it was one created by the driver's failure to properly act in time to control his car, while in Meaux *v.* Gulf Ins. Co., La. App., 182 So. 158, 161, the court said: "Under the well recognized rule that the driver of an automobile should always have his car under such control, when driving with his headlights on, so as to stop it within the distance which his lights project in front of him, the defendant Patin is bound to be held negligent in this case."

experience as a truck driver, more than half of it in driving over this identical route. He knew the I. C. C. Safety Rules for Motor Carriers, and particularly rule 231, providing: "Extreme caution in the operation of motor vehicles shall be exercised under hazardous conditions such as snow, ice, sleet, fog, mist, rain, dust, smoke or any other condition which adversely affects visibility or traction, and speed shall be reduced accordingly." Slade was not only warned by his own vision of the fog, but by Greer who turned his lights on and blinked them to indicate to Slade that there was danger ahead, and he also saw Greer enter and disappear in the fog. What is said in Lapeze *v.* O'Keefe, La. App., 158 So. 36, 37, is particularly apposite here: "The evidence shows that, just prior to entering the fog bank in which the accident occurred, he had passed through several small drifts, emerging therefrom almost as soon as he entered, and that he thought they were all of the same character. He had no reason to anticipate this. Instead of being lulled by these signals, they ought to have served as ample warning of greater danger ahead." Cf. Inman *v.* Silver Fleet and Rector *v.* Allied Van Lines, note 2, supra. In Campbell *v.* Texas & P. R. Co., La. App. 182 So. 339, the court said it did not find it necessary to determine whether the railway company was negligent in causing a dense smoke to envelope the highway for the contributory negligence of the plaintiff in driving into the smoke was the cause of the accident. Other cases in point are Illinois Central Railroad Co. *v.* Oswald, 338 Ill. 270, 170 N. E. 247; Anderson *v.* Byrd, 133 Neb. 483, 275 N. W. 825; Mitsuda *v.* Isbell, et al., 71 Cal. App. 221, 234 P. 928, and Domite *v.* Thompson, La. App., 9 So. 2d 55, where the physical facts, as here, compelled the conclusion that the truck was being driven beyond safe speed.

The judgment is reversed and the cause is remanded for further and not inconsistent proceedings.

HOLMES, Circuit Judge (dissenting).

I cannot concur in the majority opinion in this case without consciously invading the province of the jury. This is true because I think there was substantial evidence to support the verdict and all the findings of fact implicit therein.

The issue as to contributory negligence depends upon direct and circumstantial evidence. The direct evidence consists of the testimony of two eye witnesses, one of whom said that Slade was driving not more than ten miles per hour, the other twenty miles, when he met his death.

Under the evidence, different inferences might be drawn by fair and reasonable men as to the density of this fog and as to whether it was negligent to move within it at a speed not exceeding ten miles per hour. The district court did not err in refusing to decide, as a matter of law, that Slade was negligent in proceeding into a thin fog that suddenly became dense after he had traveled a short distance.

APPENDIX "E".

Cases Cited by the Majority Opinion Distinguished.

The Court of Appeals declared:

"Under these undisputed facts it will not do for plaintiffs to plead and claim that in driving as he did, Slade was in the exercise of due care. For it is settled by a long line of Louisiana cases that he was guilty of contributory negligence as a matter of law and may not recover for injuries resulting therefrom."

But the Court of Appeals inadvertently did not advert to controlling statutes and decisions hereinabove collated and which constitute the Louisiana law. The cases cited by the Court of Appeals are either readily distinguishable or not in accordance with controlling decisions of the Supreme Court in that state.

The Court of Appeals cited the following cases from the Courts of Appeal in Louisiana, which are all inferior courts:

(a) O'Rourke *v.* McConaughey, (Ct. App., Orleans), 157 So. 598. This was a fog case and the Court declared: p. 605.

"* * * The general rule emerges, by the weight of authority, that the operator of a motor vehicle * * *

shall have his car under such control that he can bring it to a complete stop within the range of his vision or the penetration of his headlights,"

which conflicts directly with Gaiennie *v.* Cooperative Produce Co., 196 La. 417, 199 So. 377, 610 (Appendix B, supra).

Again, that Court erroneously declared: p. 605.

"Futch *v.* Addison et al. (12 La. App. 535, 126 So. 590), Stafford *v.* Nelson Bros. (15 La. App. 51, 130 So. 234, 235), and Hanno *v.* Motor Freight Lines * * * (17 La. App. 62, 134 So. 317, 318), we believe not to be in accord with the jurisprudence; the circumstances in those cases being such that we believe the driver of the automobile should have anticipated and been in a position to avoid the collision. The dissenting opinion of Judge Elliott in the Hanno Case correctly states the rule thus: 'The rule is that a motorist on a highway at night must keep his car under such control that he can stop and avoid an obstruction within the distance that his headlights illuminate the way.' "

Again, in the O'Rourke Case, the fog was natural, not the outcome of defendant's wrong, wherein "there was no visibility as far as driving was concerned." Surely by this barrier Slade could not be compelled to stop on the Airline Highway and be subject to being run into from behind, unless he went forward at his own peril.

Again, that which caused Slade's death was not the speed, but the collapse of his cab.

That opinion concedes, "Fog constitutes the greatest menace of transportation whether upon land or sea and is the most feared of all perils that confront the traveler," and, quite inconsistently, cites Peart *v.* Orleans-Kenner Traction Co. (Ct. App., Orleans), 123 So. 822, wherein a recovery was had for a crossing collision in a fog. Note the extent whereto that opinion goes:

"It is no defense that traffic might be delayed indefinitely and business interfered with, as considerations of convenience must ever give way to the safety of life and limb,"

which might afford some show of reasons where the fog was created by nature, but certainly one where it arose by act of the defendant, and there is an absolute liability for

such a nuisance. 39 *Am. Juris.*, 475; Hoffman *v.* Bristol, 113 Conn. 386, 155 A. 499, 75 A. L. R. 1191; McFarlane *v.* Niagara Falls, 247 N. Y. 348, 160 N. E. 393, 57 A. L. R. 6, where, in such cases, the plaintiff is not defeated except where his act "is so extreme as to be equivalent to invitation of injury * * *."

(b) Dominick *v.* Haynes Bros. (Ct. App., 2nd Cir.), 127 So. 31, 32.

There, without cause, two drivers dashed into an impenetrable cloud of dust raised by a third automobile without cause. Each was held guilty of negligence in so doing. It was said:

"It is the duty of the driver of an automobile to stop his car when his vision is entirely obscured by a temporary obstruction, such as a cloud of dust or smoke screen. When failure to do so would jeopardize the safety of others, then he must remain at a standstill until the obstruction has come to an end,"

but here, the Oil Company had erected a fog, the duration of which was indefinite, and was an absolute nuisance without right of creation on its part, wherefor, under almost the unanimous rule, responsibility follows, except in the cases above indicated.

(c) Castille *v.* Richard, 157 La. 274, 102 So. 398, 37 A. L. R. 586, is a Supreme Court decision and in direct accord with the *Gaiennie Case* and other decisions upon which we rely.

(d) Raziano *v.* Trauth (Ct. App., Orleans), 131 So. 212. There, the holding was:

"The evidence on the question of the prevalence of fog in the vicinity of the accident is not entirely satisfactory. We will assume, however, since the evidence seems to preponderate to that effect, that there was a light fog. In so far as the light is concerned, it is difficult to understand how a light of that small candle power could have seriously affected his view. But, assuming that the light and fog did affect his view, he would be required to exercise a degree of

caution commensurate with the increased danger these circumstances involved. The fact that he did not see the truck until so close upon it cannot excuse him, for he must be held to have seen what he should have seen, or what a man of ordinary eyesight could have seen, and, if the fog affected his vision, he should not have maintained a speed of 20 miles an hour knowing that he was driving on a very narrow thoroughfare."

This, with deference, does not seriously conflict with that wherefor we contend.

(e) Rector *v.* Allied Van Lines (Ct. App., 2nd Cir.), 198 So. 516.

This decision was:

"Under the existing jurisprudence, it must be held in the instant case that the negligence of McCampbell in failing to exercise due diligence in his driving and to avert the collision, as could have been done, was the proximate and immediate cause of the accident, while the negligence of the Chevrolet's occupants was the remote cause; that the last clear chance was with him; and that plaintiffs are entitled to obtain repairment of the damages occasioned them, notwithstanding their negligence continued to the moment of the Accident."

This, with deference, does not necessarily conflict with the rule as laid down in the Supreme Court.

(f) Maggio *v.* Bradford Motor Express (Ct. App., Orleans), 171 So. 859.

Therein defendant ran into the rear of plaintiff's car, both proceeding in the same direction, defendant claiming to have been blinded by oncoming lights. Plaintiff's taillight was probably not burning.

(g) Inman *v.* Silver Fleet (Ct. App., 1st Cir.), 175 So. 436, 438, wherein it was said:

"Suffice it to say that we know of no law that would relieve the driver of an automobile at night on the highways from keeping a proper lookout and in keeping the automobile under such control as to be able to stop on approaching

an obstruction in the road plainly visible and where such obstruction is likely to appear as is the case on the travelled part of a paved public highway. Such a rule would tend to increase accidents rather than prevent them." (Where plaintiff could have seen 500 feet and did not).

This case likewise was a natural fog case and not the case where an absolute nuisance was maintained.

(h) Hutchinson *v.* James (Ct. App., Orleans), 160 So. 447, involved a rear-end collision between a truck, wherein the driver claimed he was going only about eight miles an hour. The case was tried on the theory of the truck, which stopped, being an obstruction, and said the Court:

"We reiterate what we said there and also what was said in Lapeze *v.* O'Keefe et al. (La. App.) 158 So. 36, to the effect that when a dense fog prevails, or any other condition which so affects the vision of a motorist as to make it unsafe to proceed, his duty is to stop and to remain stopped until such time as he can see where he is going,"

but, as above pointed out with reference to Lapeze *v.* O'Keefe, there is a fundamental difference between a natural fog and an artificial fog. In one there may be negligence, in the other there is absolute nuisance, if not wilfullness. The decision is not seriously out of line with the decisions of the Supreme Court.

(i) Penton *v.* Sears (Ct. App., 1st Cir.), 4 So. 2d 547, said:

"The fact that his car skidded for some distance and then struck this large and heavy truck with sufficient force to push it several feet forward indicates that he was going at a very fast rate of speed even when his car hit the truck," and in no way conflicts with that wherefor contention is made here.

(j) Russo *v.* Aucoin (Ct. App., 1st Cir.), 7 So. 2d 744.

There, the driver rounded a curve in car with inadequate brakes and ran into a truck. The driver thus so doing was held solely responsible.

As to the Federal cases cited, the Court of Appeals was bound to conform to the statute of Louisiana, as construed by its Supreme Court.

(k) It is to be noted that Smith *v.* Southern Ry. Co., 5 Cir., 53 Fed. 2d 186, cited, was an accident near Central Junction in Chatham county, Georgia, whereasto, appropriately, Georgia cases were cited. Obviously, this could not in any way be here persuasive.

(l) Brown *v.* Southern Ry. Co., 5 Cir., 61 Fed. 2d 399, likewise was a Georgia accident near Savannah, whereasto, likewise, properly, Georgia cases were cited and cases from the Federal Court, this predating Erie R. Co. *v.* Tompkins, *supra*, and, apparently, Georgia having no statute for construction as is true in Louisiana.

(m) Thompson *v.* City of Houma, 5 Cir., 76 Fed. 2d 793, was a Louisiana case, predating by three years Erie R. Co. *v.* Tompkins, and disregarded completely the Louisiana statute apparently then applicable. Note where liability was imposed, German *v.* City of New Orleans (Ct. App., Orleans), 3 So. 2d 181, 182, under very similar circumstances. See, also, Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, whereto, apparently, the Court of Appeals for the Fifth Circuit paid no heed, as it was then, assuming there was no statute, its right on questions of general law, but this disregard of the local statute as judicially construed, with deference, was improper.

(n) C. C. Moore Const. Co. *v.* Hayes, 5 Cir., 119 Fed. 2d 742, is not a Louisiana case but one arising under the laws of Mississippi, and, of course, is inapposite. Compare Mississippi Export R. Co. *v.* Summers (Miss.), 11 So. 2d 429, but see Domite *v.* Thompson (Ct. App., La., 2d Cir.), 9 So. 2d 55, wherein such a fog as was here created by the defendant was held to require warning to approaching motorists of an obstruction of a crossing by a train. The physical facts in the Domite Case vary fundamentally from those here. There the collision was head-on, and the evidences were "the almost complete smashing up of the front part of the truck; also the sound of the impact heard by a number of witnesses as well as the very great injury suffered by Mr. Domite," but here, there was no evidence of any sound of any such impact, no evidence that the overturned truck which was struck was in any way moved, and,

frankly, no substantial injury to the front part of Slade's tractor, the damage wrought by the work done being confined to the area whereat Slade's cabin was, under the tremendous mass, moving and working, with deference, as though through a lever.

Suffice it, in the face of a direct Supreme Court decision, many times reaffirmed, holding a case like this to be for the jury, the Court of Appeals should not have passed over these decisions of the Supreme Court of Louisiana and reversed where, under substantially similar facts, we submit, with deference, that Court would have affirmed.

(26)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 88.

MRS. LESLIE F. SLADE ET AL.,
PETITIONERS,

VS.

SHELL OIL COMPANY, INC., ET AL.,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI.

May It Please the Court:

Respondents respectfully submit that this Court should not entertain the petition for the issuance of writ of certiorari in this case for the following reasons:

I.

The petition and supporting brief do not contain a direct and concise statement with appropriate page references to the printed record as required by Rule 27, Paragraphs 2(d) and 3, and Rule 38, Paragraph 2, of the Rules of this Court.

II.

The Louisiana Rule was correctly announced and applied to the facts in this case by the Circuit Court of Appeals.

III.

Petitioners have not been denied any right under Rule 8 of the Federal Rules of Civil Procedure as alleged under specification number 4.

IV.

Specification number 5 is not well taken for the reasons that:

(1) There is no conflict between the Louisiana Law and the Interstate Commerce Commission Safety Rules.

(2) The Motor Carrier Act of Congress does not prevent the application of salutary local provisions to promote safety of motor traffic.

V.

Petitioners merely ask this Court to review the evidence or inferences drawn from it, which does not warrant the granting of the writ.

VI.

This Court need not examine the grounds on which the Circuit Court of Appeals has placed correct decision.

Errors in Petitioners' Statement of Case.

In most instances petitioners have neglected to give page references to the printed record in support of the facts stated. This in itself is sufficient ground for denial of the writ. *United States* v. *Rimer*, 220 U. S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Layne &*

Bowler Corporation v. *Western Well Works*, 261 U. S. 387, 393; *Mangum Import Co.* v. *Coty*, 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508.

Petitioners have inadvertently made certain statements in various parts of their petition and brief which we submit are erroneous, or might lead to erroneous conclusions.

(1) The fog is referred to as artificial and as "defendant's fog," which might imply that the fog was entirely artificial, subject to defendant's control and with characteristics distinct from that of a natural fog.

The evidence shows without dispute that the existence of the fog depended upon the following: (a) sufficient hydroscopic particles in the air to form nuclei (R. 305, 339, 367, 422); (b) temperature inversion (R. 242, 308, 384, 422); (c) relative humidity of 100% (R. 306, 340, 373, 722); (d) wind of not less than two miles an hour and not more than six miles an hour (R. 242, 339, 385, 422); (e) favorable topography (R. 313, 340, 422); (f) delicate balance between the temperature of the surface and the air (R. 282, 311, 385, 342.

Many pages of the record are consumed with expert testimony on the question of whether the fog was caused entirely by general weather conditions, or whether the oil company's "hot water ditch" contributed to the fog by increasing the rate of evaporation of the water in the ditch (R. 325-347, 358-387, 398-405, 421-448).

Natural conditions favorable for fog formation existed in the area where the accident occurred (R. 417). On the night and early morning preceding the accident, a general fog extended over the entire area around Norco, Louisiana, beginning seven miles west of Norco at Laplace, Louisiana, and extending as far east as Kenner, Louisiana, a distance of approximately 17 miles (R. 481-482). There were no visible characteristics distinguishing this fog from

any other fog which frequently occurs in numerous places in Southeastern Louisiana (R. 480, 483).

(2) Petitioners state "the fog was a cause—not a condition" (petition 2), and also state in numerous places in the petition and brief that the fog was caused by the wrongful or negligent acts of the Oil Company. The sufficiency of the plaintiff's evidence on both questions was challenged on appeal, and the Circuit Court of Appeals reserved a decision on each question as being unnecessary as Slade's contributory negligence defeated recovery (R. 603).

(3) The poem relied upon (petition 2) does not appear in the record, and we submit is no proof of the frequent existence of "steam made" fogs.

(4) The record fails to show that the "chicken truck" had lost its way. On the contrary, it shows that the driver of this truck had stopped temporarily for the purpose of adjusting his windshield wiper (R. 43).

(5) Petitioners' statement on Page 3 might indicate that Slade was killed immediately upon entering the heavy fog. The record shows that Slade had driven several hundred feet in the thin fog, the distance from the foot of the Spillway levee where the thin fog was first encountered to the scene of the accident being approximately one-half of a mile (R. 88), and that, after striking the thick fog, Slade traveled approximately fifty feet on the pavement and then swerved off the pavement and ran forty-six feet on the shoulder of the highway before striking Greer's truck (R. 92). Petitioners refer to Page 182 of the record as indicating that Slade had not traveled a sufficient distance on the shoulder to clear the pavement of his truck and trailer. Mr. Arnold's testimony does not in any wise dispute the distance that Slade traveled into the thick fog before the collision, but merely insists that the right side of the truck and trailer was off on the shoulder and that the left wheels thereof had not left the pavement (See cross-examination of same witness, R. 202).

(6) Petitioners make a statement on Page 27 of the brief implying that certain changes may have taken place between the time of the accident and the time when the photographs were taken. No reference is made to the record to support such statement, and we have been unable to find any evidence to sustain the statement.

Statement of Case.

Judge Hutcheson, in rendering the opinion of the Circuit Court, very clearly and accurately set forth the controlling facts (R. 599-603). We would merely call attention to the court's statement of the facts, except for the elaboration thereon contained in the petition and argument.

Plaintiff intestate, Leslie F. Slade, was a young man twenty-seven years of age and in perfect physical condition (R. 39, 70). He had approximately ten years experience as a truck driver, the greater part of which was in driving from Jackson, Mississippi, to and from New Orleans, Louisiana, and had the reputation of being one of the best and one of the fastest drivers in the employment of Gordon Transports, Inc., a common carrier of freight for hire by motor vehicle (R. 106). Shell Oil Company, Inc., defendant in the district court, had operated an oil refinery at Norco, Louisiana, since 1919. This plant was situated on the north bank of the Mississippi River approximately twenty-two miles west of New Orleans (measured along the Airline Highway). The area around Norco consisted of low marshy swamp lands, largely surrounded by bodies of water. The Mississippi River was on the south, the City of New Orleans and the Gulf of Mexico on the east, Lake Pontchartrain and Lake Maurepas on the north and the Bonne Carre Spillway on the west, connecting the Mississippi River with Lake Pontchartrain. The Oil Company's business of refining crude oil into commercial products was carried on by a process of distillation and condensation, requiring the ar-

tificial heating and cooling of such products (R. 125-128). This process requires the use of approximately seven thousand gallons of water per minute, which water passes from the Oil Company's plant into an underground pipe approximately 2,800 feet long, at which point the same was discharged into an open ditch. The temperature of the water at the point where the same was discharged into the open ditch was approximately 110 degrees Fahrenheit (R. 128). Prior to the construction of the Airline Highway, this water, discharged from the Oil Company's refinery, followed the natural course of drainage and in a northerly direction into Bayou Trepagnier, thence into Bayou La Branche from whence it flows into Lake Pontchartrain at a point approximately five miles north of the refinery (R. 139).

About 1928 or 1929 the Louisiana State Highway Commission surveyed the highway from Baton Rouge to New Orleans, known as the Airline Highway. The highway passed through the swamps from Norco to New Orleans, Louisiana (R. 468). On October 30, 1930, the Oil Company donated a right of way through its property to the State of Louisiana (R. 136-139). A foundation for the highway was constructed by dredging a canal sixty feet wide through the swamps so as to provide earth upon which to build a roadway (R. 454-455). Construction of this canal diverted the natural course of the drainage from the Oil Company's property from its former course in a northerly direction into Lake Pontchartrain into the highway canal, running in an easterly and westerly direction (R. 456). About 1934 a highway was constructed along the earth embankment provided by dredging the canal. The Airline Highway crossed the Oil Company's water disposal ditch at a point approximately 1,400 feet from where the water was discharged into said ditch (R. 453). The bottom of the canal at this point was below sea level and it was not possible to prevent the course of said drainage from being diverted into and along the highway canal.

On March 4, 1940, Leslie F. Slade left Jackson, Mississippi, on a trip to New Orleans, Louisiana, driving a combination tractor and semi-trailer, commonly known as a "truck," being the usual type of motor carrier equipment observed on the highways. The motor power was furnished by a four-wheel tractor weighing 5,400 pounds to the rear of which was attached a trailer, the front end of which rested upon a "fifth wheel" attached to the rear of the tractor, and the rear of the trailer was supported by two wheels thereunder. The trailer was approximately 10 feet high and 6 feet wide and weighed 7,200 pounds when empty, and on this occasion carried a load of about 9,000 pounds. The truck was painted yellow. The tractor was manufactured by the International Harvester Company and the trailer by the Carter Trailer Company, both being standard equipment. The tractor was equipped with hydraulic brakes and the trailer with vacuum brakes, resulting in efficient braking equipment for the six wheels of the combination. The equipment was mechanically in perfect condition and met the requirements of the Interstate Commerce Commission to the effect that when being driven at 20 miles per hour the combination trailer and tractor could be stopped within a distance of 30 feet (R. 70, 74, 76 and 103), and, when driven at a speed of five miles per hour, the equipment described above could be stopped in a distance of five feet or less (R. 96).

Franklin Ford Greer was also employed by Gordon Transports, Inc., and on the same occasion was driving similar equipment over the same route. A light fog was encountered at Manchac Pass over Lake Maurepas (R. 86). Near Laplace, Louisiana, both truck drivers again stopped and checked their trucks. This occurred around 7:00 A. M., at which time both of the drivers were one hour late on their schedule to New Orleans (R. 86-87).

The Bonne Carre Spillway is situated about five miles east of Laplace, Louisiana, and just west of Norco, Louisi-

ana. At this point the highway follows the top of the Mississippi River Levee across the Spillway and has an elevation of approximately 15 feet or 20 feet above the surrounding territory which consists of a low, level, marshy swamp, grown up in willow and cypress trees (R. 70). As a driver comes off the east end of the Spillway elevation, the highway is straight for a distance of approximately three miles and on a clear day the vision is unobscured for that distance. On the east end of the Spillway Bridge it is approximately one-tenth of a mile from the top of the levee to the foot of the Spillway elevation. It is approximately five-tenths of a mile from the foot of the Spillway elevation to the side road on the south side of the New Orleans Highway, which side road leads through a gateway in a southerly direction to the Shell Oil Company Refinery at Norco, Louisiana. The collision occurred on the highway at a point opposite the Shell Oil Company gateway (R. 88). At the time of the accident the road bed of the main highway had been constructed for sufficient width to provide for a four-lane highway, being approximately 56 feet wide. The paved portion of the highway, however, was only 19 feet 10 inches in width with a dirt shoulder of approximately 6 feet 6 inches on the north side of the highway and a dirt shoulder approximately 29 feet 8 inches in width on the south side of the highway. The dirt shoulder was not prepared for travel (R. 44).

As Greer drove down the incline on the east end of the Spillway, he observed in his rear view mirror Slade following him at a distance of approximately 200 or 250 yards to the rear. Both drivers were then proceeding at a speed of approximately 35 miles per hour (R. 88-89). As Greer encountered the thin fog near the foot of the Spillway he began to slow down and blinked his lights so as to warn Slade to be cautious (R. 93). Greer stressed the fact that Slade was in a more advantageous position than he was due to the fact that Slade not only was warned

by the blinking of his lights but could gauge the visibility by seeing Greer's truck disappear into the fog.

Greer drove through the thin fog for a distance of several hundred feet (R. 88), whereupon he encountered a very thick, heavy fog and, after driving about fifty feet in the thick fog, he suddenly noticed a "chicken truck" parked in front of him in his lane of traffic. He swerved off the pavement at something like a forty-five degree angle (R. 94) and continued to travel on the shoulder of the road when he almost encountered a truck belonging to the Louisiana and Arkansas Railway Company, driven by a Mr. Arnold, proceeding slowly along the shoulder of the road in a westerly direction. Greer again attempted to make a short turn to avoid Arnold's truck and thereby overturned the truck he was driving on the shoulder of the highway (R. 53-54).

Slade followed Greer's course, dodged the automobile commonly referred to as the "chicken truck," temporarily stopped on the pavement and located about 50 feet inside the thick fog, drove off onto the shoulder of the road, and, after driving 46 feet thereon, struck Greer's overturned truck with a terrific impact, shearing the steel "king pin," approximately three inches in diameter, releasing the trailer to his truck, which plowed forward into the cab, mashing the same like crumpling paper with your hands, and causing Slade's death (R. 95). The evidence and also the pleadings show without dispute that "the vision of the said Slade was wholly obscured on said occasion by said dense and heavy fog and cloud and in such fog or cloud he was unable to * * * stop said truck in sufficient time to avoid a collision" (R. 7).

Both Greer and Arnold testified that Slade made no effort to apply his brakes (R. 95, 96, 198).

The record completely sustains the statements of fact and the conclusions as set forth in the Circuit Court of Appeals by Judge Hutcheson.

Louisiana Rule Was Correctly Announced and Applied to the Facts in This Case by the Circuit Court of Appeals.

Judge Hutcheson, in rendering the opinion of the Circuit Court of Appeals, states the Louisiana rule as follows (R. 603):

> "It is settled law in Louisiana that one entering a fog, such as the one pleaded and testified to here, must stop until sure of his way, or, if he drives into it, he must proceed at such a speed as that he can stop the car in the distance within which he can see objects in his way."

That such is the rule in Louisiana not only as to a fog, but as to any obstruction to the view upon a highway is well settled by the following cases:

When vision was obscured by fog: *O'Rourke* v. *McConaughey*, 157 So. 598; *Raziano* v. *Trauth*, 15 La. App. 650, 131 So. 212; *Penton* v. *Fisher*, (La. App.) 155 So. 135; *King* v. *Jamstremski*, (1927) 6 La. App. 335, 73 A. L. R. 1026; *Lapeze* v. *O'Keefe*, (C. A. A.) 158 So. 36; *Hutchinson* v. *T. L. James & Co.*, 160 So. 447; *Rector* v. *Allied Van Lines*, (La. App.) 198 So. 516; *F. Strauss & Son, Inc.*, v. *Childers*, (La. App.) 147 So. 536.

When vision was obscured by dust: *Castille* v. *Richard*, 157 La. 274, 102 So. 398; 37 A. L. R. 586.

When vision was obscured by smoke: *Dominick* v. *Haynes Bros.*, 127 So. 31; *Camel* v. *Texas & Pacific Railway Co.*, (La. App.) 182 So. 339.

When vision was obscured by blinding headlights: *Pepper* v. *Walsworth*, 6 La. App. 610; *Woodley & Collins* v. *Schusters' Wholesale, Inc.*, 12 La. App. 467, 124 So. 559; (La. S. Ct.) 170 La. 527, 128 So. 469; *Safety Tire Service, Inc.*, v. *Murov*, 19 La. App. 663, 140 So. 879; *Mansur* v. *Abraham*, (La. App.) 164 So. 418; *Maggio* v. *Bradford Motor Express, Inc.*, (La. App.) 171 So. 859; *Harper* v. *Holmes*, (La. App.) 189 So. 463.

When vision was obscured by curve or turn in the road: *Arbo* v. *Schulze,* (La. App.) 173 So. 560; *Rosso* v. *Aucion,* 7 So. 2d 744.

When vision was obscured by heavy rain or mist: *Mouton* v. *Talbot & Son,* (La. App.) 161 So. 899; *Becker* v. *Mattel,* (La. App.) 165 So. 474; *Penton* v. *Sears, Roebuck & Co.,* (La. App.) 4 So. 2d 547.

When vision was obscured by extreme darkness: *Louisiana Power & Light Co.* v. *Saia,* (La. App.) 173 So. 537; (La. S. Ct.) 177 So. 238; *Pollet* v. *Robinson Lumber Co.,* (La. App.) 123 So. 155.

Petitioners seek to avoid the effect of this well settled Louisiana law by urging that the Louisiana rule was changed in the case of *Gaiennie* v. *Cooperative Produce Co.,* 199 So. 377, decided by the Supreme Court of Louisiana on November 4, 1940. This case is considered of sufficient importance by petitioners that they set the same out in full as Appendix B to the petition and brief, same appearing in said appendix to the petition on pages 45-51, inclusive.

This case does not change the well established Louisiana rule as recognized and followed by the Circuit Court of Appeals in the present case, but merely recognizes a long existing and well established exception to the rule. This should be clear from the statement of Judge Ponder in the Gaiennie case in the following language:

> "While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253."

The exception recognized in said case is merely an application of the "sudden emergency doctrine" to the general rule set forth above. In a case where a driver has

no reason to anticipate the presence of an obstruction and is free of negligence contributing to the emergency, the exception applies, and under such circumstances a driver is relieved of contributory negligence.

This rule was not first established in the Gaiennie case; on the contrary, the leading case in Louisiana on the question of this exception to the general rule is that of *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, which was decided on March 12, 1917, more than twenty-five years ago, and has been followed by a long line of authorities.

While counsel for the petitioners wholly fail to call attention to the Gaiennie case in the Circuit Court, either in their original brief or in their petition for rehearing, they did in their original brief cite a long line of authorities on the question of the application of the emergency doctrine, which authorities are set forth and quoted from in appellee's brief before the Circuit Court of Appeals on pages 43-62, inclusive. In the reply brief of appellant before the Circuit Court of Appeals, it was definitely pointed out that such cases were not applicable because each and all of the cases excusing a driver from contributory negligence were based upon the condition that the obstruction in the highway be unexpected and such as the driver was not required to anticipate and that the driver be guilty of no negligence contributing to the emergency.

The law in Louisiana both as to the general rule and as to the exception thereto is so well established that there should be no difficulty in announcing either the general rule or the exception thereto. Difficulty, however, does arise in applying the rule and the exception thereto to the varying and complicated facts in cases before the court for decision.

In the Gaiennie case the circumstances were such that the driver had no reason to anticipate the presence of an obstruction upon the highway and exercised due care under the circumstances which existed, and was not guilty of any negligence which contributed to the emergency.

The court, after full consideration of the facts in that case, decided that such facts came within the exception to the rule, instead of within the general rule.

In order to bring the present case within the exception to the rule, it would be necessary for the facts to show that Slade had no reason to anticipate an obstruction upon the shoulder of the highway. It is well settled law in Louisiana not only that a person stop when encountering a fog obstructing a driver's vision, but also that such driver must anticipate the presence of other cars stopped upon the highway in the fog. *O'Rourke* v. *McConaughey*, (C. A. La., 1935) 157 So. 598; *Pepper* v. *Walsworth*, 6 La. App. 610, *Safety Tire Service, Inc.*, v. *Murov*, (La. App.) 140 So. 879; *F. Strauss & Son, Inc.*, v. *Childers*, (La. App.) 147 So. 536; *Penton* v. *Fisher*, (La. App.) 155 So. 135. It is again urged, as it was in the Circuit Court of Appeals, that the thin fog deceived Slade and led him to believe that he might safely proceed into the fog. The Louisiana court has held that a light fog, or a fog of varying thickness, preceding a heavy fog should constitute warning of greater danger ahead and cause a driver to take extra precautions instead of excusing a driver from driving into fog under such conditions. *Lapeze* v. *O'Keefe*, (La. App.) 158 So. 36; *Inman* v. *Silver Fleet of Memphis*, (C. A. La., 1939) 175 So. 436. The testimony in this case further shows that the shoulder of the road where the collision occurred was not prepared for traffic, but was used as a place where vehicles might park, and, therefore, Slade certainly had no reason to anticipate that the shoulder of the road would be free of obstruction and he should have governed his conduct accordingly.

Doubtless, there are many cases where the circumstances require a drawing of close distinctions and a careful study of the facts to determine whether the same comes within the general rule or within the exception to the rule. In this case, however, there were repeated warnings to the driver of the situation ahead. The fog

was visible from the elevated position on top of the Spillway for more than a half of a mile from the point of the collision. The highway was straight for several miles and any driver observing the conditions was bound to have known that his view was obstructed.

Slade was in the fortunate position of having another truck driver precede him into the fog. He was warned of the danger by Greer's blinking his lights upon entering the fog. He was also warned as to the density of the fog and the limit of his visibility upon seeing Greer's truck disappear into the fog. Only a few minutes before Slade and Greer had discussed the fact that the same truck that Greer was driving had pulled over on the shoulder of the road on the trip down from Memphis and had overturned on the highway with the same load which he then carried. Slade, therefore, was not only charged with knowledge that some truck would likely be parked upon the shoulder of the highway (*Hutchinson* v. *T. L. James & Company, Inc.*, (La. C. App., 1935) 160 So. 447), but he was bound to have anticipated that Greer's truck might overturn on the shoulder of the highway, and that, in running into the fog blindly, he took a chance upon encountering an obstruction.

The Circuit Court of Appeals referred to the force of the collision and the results thereof, as shown by the photographs, in the following language:

> "The undisputed evidence as to the force of the collision, and the photographs taken showing the condition of the trucks after the collision, established that, heavily loaded as it was, * * * Slade's truck was running much too fast for safety."

That the court was justified in reaching such a conclusion as a matter of fact is shown by the photographs before this Court, and that the court was justified in reaching such a conclusion as a matter of law is sustained by the case of *Domite* v. *Thompson*, (La. App., June 2,

1942) 9 So. 2d 55. The case of *Inman* v. *Silver Fleet of Memphis*, (La. App., 1937) 175 So. 436, presents a factual situation more nearly in point with that of the present case, than any other case that we have been able to find on this question, and in that case the court said:

> "* * * She knew that the night was misty and fog pockets were hovering over the road * * *. She had 500 feet in which to prepare for the situations which she was approaching, and the nature of which she could not determine, and yet did not take the precaution of bringing her car under proper control to meet the situation, whatever it might turn out to be, but she took a chance on the road being clear of obstructions and lost her guess."

Slade encountered almost an indentical situation, and the Circuit Court of Appeals said (R. 603):

> "* * * Slade drove into the dense fog where he could not see his own way and was the author of his own death. * * *"

It should be noted that petitioners relied upon *Futch* v. *Addison et al.*, 12 La. App. 535, 126 So. 590; *Stafford* v. *Nelson Bros.*, 15 La. App. 51, 130 So. 234, 235; *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317.

Each of the above styled cases have been subsequently expressly disapproved or overruled. *O'Rourke* v. *McConaughey*, (La. C. App., 1934) 157 So. 598 (605); *Blahut* v. *McCahil*, 163 So. 195 (198).

Petitioners Have Not Been Denied Any Right under Rule 8 of the Federal Rules of Civil Procedure As Alleged under Specification Number 4.

Petitioners seek permission from this Court to be allowed to litigate again the question of Nuisance which has been finally concluded by a final judgment in the District Court in respondents' favor and from which petitioners prosecuted no appeal.

Petitioners cite Rule 8 of the Federal Rules of Civil Procedure, which contains paragraph (e) (2) in part as follows:

> "A Party may set forth two or more statements of a claim or defense alternately or hypothetically, *either* in one count or defense *or* in separate counts or defenses."

Petitioners' complaint filed in the District Court contained two counts. The first was predicated on negligence (R. 2-7); the second count was predicated on nuisance (R. 8-10). There was a jury verdict and final judgment in favor of respondents on the second count on August 14, 1941 (R. 562-563). Petitioners did not appeal from this final judgment on the second count which involved the question of nuisance.

The requirement that an appeal from a final judgment be taken within three months is mandatory. 28 U. S. C. A., Sec. 230; Federal Rules of Civil Procedure, Rule 73 (a); *Morrow et al.* v. *Wood et al.*, (C. C. A. 5th) 126 F. 2d 1021.

A judgment not appealed from is final, *Kithcart* v. *Metropolitan Life Insurance Company*, (C. C. A. Mo.), 119 F. 2d 497, cer. den. *U. S. ex rel. Kithcart* v. *Gardner*, 315 U. S. 808, 62 S. Ct. 793, 86 L. Ed. .....

This Court has repeatedly declared that an appellee may not secure any modification in his favor of a judgment unless he appeals. *Clearly* v. *Ellis Foundry Co.*, 132 U. S. 612, 10 S. Ct. 223, 33 L. Ed. 473; *Fitchie* v. *Brown*, 211 U. S. 321, 329, 29 S. Ct. 106, 53 L. Ed. 202; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 277, 52 S. Ct. 166, 76 L. Ed. 516; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487, 54 S. Ct. 292, 78 L. Ed. 452; *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250, 58 S. Ct. 159, 82 L. Ed. 231; *Le Tulle* v. *Scofield*, 308 U. S. 415, 421, 60 S. Ct. 313, 84 L. Ed. 355.

In *Helvering* v. *Pfeiffer, supra,* this Court said:

"* * * an appellee cannot without a cross-appeal attack a judgment entered below."

In *Le Tulle* v. *Scofield, supra,* this Court said:

"A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.

"*The Stephen Morgan,* 94 U. S. 599, 24 L. Ed. 266; *Mt. Pleasant* v. *Beckwith,* 100 U. S. 514, 527, 25 L. Ed. 699, 702; *United States* v. *Blackfeather,* 155 U. S. 180, 186, 39 L. Ed. 114, 116, 15 S. Ct. 64; *Landram* v. *Jordan,* 203 U. S. 56, 62, 41 L. Ed. 88, 90, 27 S. Ct. 17; *Bothwell* v. *United States.* 254 U. S. 231, 233, 65 L. Ed. 238, 240, 41 S. Ct. 74; *United States* v. *American R. Exp. Co.,* 265 U. S. 425, 435, 68 L. Ed. 1087, 1093, 44 S. Ct. 560; *Morley Constr. Co.* v. *Maryland Casualty Company,* 300 U. S. 185, 191, 81 L. Ed. 593, 597, 57 S. Ct. 325."

In *Reed* v. *Allen,* 286 U. S. 191, 52 S. Ct. 532, 76 L. Ed. 1054, this Court announced the applicable rule as follows:

"If respondent, in addition to appealing from the decree, had appealed from the judgment, the appellate court, having both cases before it, might have afforded a remedy. *Butler* v. *Eaton,* 141 U. S. 240, 35 L. Ed. 713, 11 S. Ct. 985. But this course respondent neglected to follow."

* * * * * * *

"Having so failed, we cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater

> than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 68, 69, 25 L. Ed. 93, 96."

In *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, this Court said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

The final judgment in favor of respondents on the question of nuisance in the District Court has not been assigned as error by petitioners in the Circuit Court of Appeals and cannot be the grounds for a writ of certiorari, *Sonzinsky* v. *United States*, 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772; *Waterloo Distilling Corporation* v. *United States*, 282 U. S. 577, 51 S. Ct. 282, 75 L. Ed. 558.

Even if petitioners had preserved this point in the record in this case by proper appeal and assignment of error, it could not be the basis for the granting of a writ of certiorari for the reason that petitioners would be confronted with concurrent findings of fact by the District Court and by the Circuit Court of Appeals, *Virginian Railroad Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *Alabama Power Company* v. *Ickes*, 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374.

Specification Number 5 Is Not Well Taken for the Reasons That:

(1) There Is No Conflict Between the Louisiana Law and the Interstate Commerce Commission Safety Rules.

(2) The Motor Carrier Act of Congress Does Not Prevent the Application of Salutary Local Provisions to Promote Safety of Motor Traffic.

Petitioners take the position that there is a conflict between the Rules of the road under the Louisiana Law

and the Safety Rules and Regulations of the Interstate Commerce Commission. Petitioners allege that Rule 2.22, which prohibits parking on a highway is in conflict with the Louisiana Law, which requires a driver to stop if his vision becomes wholly obscured. The Rule referred to provides in part as follows:

> "No motor vehicle shall be stopped, parked or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. * * *"

Petitioners are mistaken as to the existence of a conflict and as to the proper construction to be placed upon the above quoted rule. Rule 15 (a) of the Rules of the road of the State of Louisiana, Act No. 286 of the Louisiana Laws of 1938, contains almost the identical language and provides in part as follows:

> "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; * * *"

Where it becomes necessary under the Louisiana Law for a driver to stop momentarily because his vision has become obscured, same is not within the prohibition of the statute or the Rule.

In the case of *Hutchinson* v. *T. L. James & Company, Inc.*, (La. C. App., 1935) 160 So. 447, the court in commenting upon whether a temporary stop in a fog was in violation of Section 3, Rule 15-A, of the Louisiana Act 21 of 1932, which provides:

> "No person shall park * * * any vehicle * * * upon the paved or improved or main traveled portion of any highway."

said:

> "* * * We do not believe that the act referred to is applicable to this case because it can hardly be said that defendant's truck was 'parked' on the highway. It had simply stopped for a few seconds in order that its driver might ascertain if the road was clear for further progress. * * *"

Petitioners are also in error in alleging that the Rules and Regulations of the Interstate Commerce Commission would take precedence over the local traffic rules and regulations of the different states and localities. In *Sharp et al.* v. *Barnhart et al.*, (C. C. A. 7) 117 F. 2d 604, the court said:

> "The Motor Carrier Act of Congress does not prevent the application of the salutary local provisions to promote safety of motor traffic. In the case of *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 59 S. Ct. 438, 441, 83 L. Ed. 500, the Court said:
>
> > 'The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. * * * In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed.' "

This question has been decided by this Court adversely to the contentions of petitioners on several occasions. *Maurer* v. *Hamilton*, 309 U. S. 598, 60 S. Ct. 726, 84 L. Ed. 969; *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641; *Ziffrin, Inc.*, v. *Reeves*, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

It has also been held that the Rules and Regulations of the Interstate Commerce Commission do not supercede *bona fide* traffic regulations of municipalities. *Lowe* v.

City Council of Augusta, (D. C. Ga.) 45 F. Supp. 143; *Commonwealth* v. *Kennedy,* (Pa.) 195 Atl. 770.

Petitioners Merely Ask This Court to Review the Evidence or Inferences Drawn from It, Which Does Not Warrant the Granting of the Writ.

We respectfully submit that it has been demonstrated that the Circuit Court of Appeals correctly applied the Louisiana Law to the facts presented by the record in this case. The sum and substance of the petition filed is to persuade this Court to review the evidence and such inferences as may be drawn therefrom. This Court has consistently and wisely declined to grant writs of certiorari for this purpose. *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273; *Egan* v. *Hart,* (La.) 165 U. S. 188, 189, 191; *People of State of Illinois* v. *Economy Light & Power Co.,* 234 U. S. 497, 519, 523.

Even if this Court disagreed with the Circuit Court of Appeals as to whether the facts presented by petitioners in the trial court were sufficient to take the case to the jury, it could not and would not settle any important principle or question of public policy. The Louisiana Law on the questions involved is clear. The application of the law to the facts in each particular case necessitates a decision on the part of the District Court originally and on the part of the Circuit Court of Appeals on appeal to determine whether the defendant is entitled to a directed verdict. The duty of determining this question rests solely on the Circuit Court of Appeals and should not be imposed upon this Court. If this court reviewed each such case in order to determine whether it was in agreement with the decision of a particular Circuit Court of Appeals, this Court would not have time for any other type of litigation, and questions of primary importance which should receive the attention of the Supreme Court of the United States would suffer.

Petitioners cite *Bailey* v. *Central Vermont Railway*, No. 640, decided May 24, 1943, 84 L. Ed. 1030, which was reviewed by this Court because it involved a construction of the Federal Employer's Liability Act. The opinion rendered by Mr. Justice Roberts in that case is particularly applicable to the case presented by this record.

This Court Need Not Examine the Grounds on Which the Circuit Court of Appeals Has Placed Correct Decision.

The conclusions reached by the Circuit Court of Appeals on the question of contributory negligence made it unnecessary for that court to pass on the question of negligence on the part of respondent and upon the question of proximate cause. These questions were expressly pretermitted. In so doing the Circuit Court of Appeals followed strictly the procedure adopted in similar cases by the Louisiana courts. *Campbell* v. *Texas & Pacific Railway Co.*, (La. App.) 182 So. 339.

The record discloses beyond question that respondent was entitled to a directed verdict under each of these points which were pretermitted. This being true, this Court will not examine the grounds on which a Circuit Court of Appeals put a correct decision. *Alpha S. S. Corp.* v. *Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086.

It Affirmatively Appears from the Record That Respondent Was Not Guilty of Any Negligence Which Contributed to the Accident.

Where the situation complained of was created by the State Highway Commission of Louisiana, on whom the Laws of Louisiana place the exclusive duty to construct and maintain the highway, the respondent, as a private property owner in a rural community, was under no duty to anticipate that the conditions so created might, during certain weather conditions, render the highway unsafe.

This case presents a situation created wholly and entirely by the Louisiana Highway Commission. Respondent had no control over the selection of the site for the highway; it had no control over the details of construction; it had no control over the decision on the part of the Louisiana Highway Commission to dredge the canal north of the highway, thereby interrupting existing drainage. The Louisiana Highway Commission had exclusive control over these acts and it is exclusively within the jurisdiction of that Commission to determine whether any given situation creates or constitutes a hazard on a public highway.

If, in fact, a dangerous situation has been created on the highway at Norco, which is denied, it has been solely brought about by the action of the Louisiana Highway Commission, over whom this respondent had no control whatever. It clearly follows that there was no duty on the part of the respondent to anticipate that the condition thus created constituted a menace or a danger to the traveling public. *Warner* v. *De Britton*, (La., 1933) 151 So. 239; *Zacharias* v. *Nesbitt*, (Minn.) 185 N. W. 205; *Chambers* v. *Whelan*, (C. C. A. 4) 44 F. 2d 340; *Rose* v. *Slough*, (N. J.) 104 Atl. 194; *Burrow* v .*St. Louis Public Service Co. et al.*, (Mo.) 100 S. W. 2d 269; *Lopes* v. *Sahuque*, (La.) 38 So. 810; *Millstead* v. *City of New Orleans*, (La.) 146 So. 492.

Petitioners wholly failed to prove the alleged negligence on the part of respondent with that *reasonable certainty* required by the Louisiana Law. *Adkins* v. *New Orleans Railway & Light Co.*, 2 La. App. 130; *Rohr* v. *New Orleans Gaslight Co.*, (S. Ct. La.) 67 So. 361; *Transportation Mutual Ins. Co.* v. *Southern Scrap Material Co.*, (S. Ct. La.) 160 So. 800; *O'Neill* v. *Hemmingway*, (La.) 3 So. 2d 210; *McGregor* v. *Saenger-Ehrlich Enterprises*, (La.) 195 So. 624; *Vanderdoes* v. *Rumore*, (La.) 2 So. 2d 284; *Bruchis et al.* v. *Victory Oil Co.*, (La.) 153 So. 828; *Regas* v. *Doublas*, (La.) 72 So. 242.

It Affirmatively Appears from the Record in This Case That the Fog Was Merely a Condition and Not the Proximate Cause of the Collision.

The question of Slade's contributory negligence and that of the proximate cause of the collision and Slade's death resulting therefrom are closely related both as to the facts involved and the question of law.

We will not repeat the statement of how the accident occurred which we have set forth in connection with the argument on contributory negligence. The record contains much testimony relative to the nature of the fog which the complainant contended was artificially created by the alleged negligence of the Shell Oil Company and was the proximate cause of Slade's driving his truck into the rear end of Greer's truck. Regardless of how the fog was created, the evidence shows without dispute that the characteristics of this fog were no different from that of a natural fog.

In Louisiana the doctrine of the "last clear chance" prevails, and, even if we should assume for the sake of argument that the fog was created artificially by some negligent act of the Shell Oil Company, it would not follow that the fog was the proximate cause of the collision resulting in Slade's death if Slade had a reasonable opportunity to avoid the collision by exercising proper precaution. Slade was under a positive duty when confronted with the fog to stop if necessary and in any event to reduce his speed where he could stop within the range of his vision. If he had performed his duty in this respect the collision would not have occurred. Under the circumstances Slade's act was the proximate cause of the collision. *O'Rourke* v. *McConaughey*, (La. App., 1934) 157 So. 598; *Pollet* v. *Robinson Lumber Co.*, 10 La. App. 760, 123 So. 155; *Woodley & Collins* v. *Schuster's Wholesale Grocery Co., Inc.*, 12 La. App. 467, 124 So. 559; *Raziano* v. *Trauth*, 15 La. App. 560, 131 So. 212, 213; *Rector* v. *Allied Van Lines*, (La. Ct. of App., July 5, 1940) 198 So.

516; *Harper* v. *Holmes,* (C. A. La., 1939) 189 So. 463; *Campbell* v. *Texas & Pacific Ry. Co.,* 132 So. 339; *Inman* v. *Silver Fleet of Memphis,* (C. A. La., 1937) 175 So. 436; Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 4, p. 336; *Illinois Central Railroad Co.* v. *Oswald,* (Ill., 1930) 170 N. E. 247; *Anderson* v. *Byrd et al.,* (Neb., 1937) 275 N. W. 825; *Mitsuda* v. *Isbell et al.,* (Calif., 1925) 234 Pac. 928; *Thompson* v. *City of Houma, La.,* (La. App.) 76 F. 2d 793; *Orton* v. *Penn. R. Co.,* (C. C. A.) 7 F. 2d 36; *Western Union Telegraph Co.* v. *Stephenson,* (C. C. A.) 36 F. 2d 47; *Smith* v. *Southern R. Co.,* (C. C. A.) 53 F. 2d 186; *Brown* v. *Southern R. Co.,* (C. C. A.) 61 F. 2d 300.

We, therefore, respectfully submit that the petition for Writ of Certiorari should be denied.

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(27)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 88

MRS. LESLIE F. SLADE, ET AL.,
Petitioners,

vs.

SHELL OIL COMPANY, INC., ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS.

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SUPREME COURT OF THE UNITED STATES

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No. 88

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REPLY BRIEF FOR PETITIONERS.

I.

General Remarks.

After careful study of the reply of Shell Oil Company, Inc., et al., respondents, with deference, we submit that Certiorari should be granted for the reasons set forth in petitioners' brief, affirming that they vouchsafe to petitioners this writ.

We make response to the extent deemed necessary, to respondents' contentions, listing them in the order of their importance.

II.

Petitioners' Alleged Failure to Comply With Rule 27, Paragraphs 2 (d) and 3, and Rule 38, Paragraph 2 of This Court (Respondents' Brief 1, 2).

1. Rule 38, paragraph 2 is that here controlling. Its pertinent provisions are:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. See United States *v.* Rimer, 220 U. S. 547; Furness, Withy & Co. *v.* Yang Tsze Insurance Assn., 242 U. S. 430; Houston Oil Co. *v.* Goodrich, 245 U. S. 440; Layne & Bowler Corporation *v.* Western Well Works, 261 U. S. 387, 392; Magnum Import Co. *v.* Coty, 262 U. S. 159, 163; Southern Power Co. *v.* North Carolina Public Service Co., 263 U. S. 508."

With deference, this Court, as well as respondents, thoroughly understood the reasons why Certiorari was asked and we, with deference, submit that the petition and brief filed literally comply with this rule.

2. Respondents' cases, taken from Rule 38, paragraph 2, are not here applicable, being readily distinguishable:

(a) *United States* v. *Rimer,* 220 U. S. 547, 55 L. Ed. 578. Therein Certiorari had been granted upon the representa-

tion of the United States that this case involved a principle of far-reaching importance. On the final hearing, it developed that it did not; therefore, the writ was dismissed.

(b) *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 61 L. Ed. 409.

Therein, Certiorari having been granted, the writ was dismissed, when it appeared on the hearing that a later final decree was based upon an express compromise agreement precluding attack.

(c) *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385.

Therein, the writ was granted, but upon hearing it developed that the questions involved depended essentially upon the solution of a question of fact and therefore the writ was dismissed.

(d) *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, 67 L. Ed. 922.

This involved not the dismissal of a petition for Certiorari, but under what circumstances this Court would stay the judgment in the Court of Appeals pending an application for Certiorari herein.

(e) *Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508, 68 L. Ed. 413.

In this case the petition for Certiorari alleged that the decree would deprive petitioners of property without due process of law and freedom to contract, contrary to the constitution. The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, primarily a question of fact. Therefore certiorari was dismissed.

III.

Defendants' Fog (Respondents' Brief, Page 3).

As to whether or not Respondents caused the fog wherein Slade was killed, plaintiffs' evidence showed that it did; upon respondents' motion for directed verdict at the conclusion of plaintiffs' testimony (R. 397), the District Judge so ruled; at the conclusion of all of the evidence, the District Judge declared (R. 561), "Let the case now be submitted to the jury."

Whereupon the jury returned a verdict for petitioners, each juror signing the verdict—a rather unusual proceeding—(R. 561); thereafter, the District Judge refused to vacate the finding that defendants' fog caused or contributed to the injury (R. 575) in overruling defendants' motion for judgment notwithstanding the verdict, and, in the alternative, for a new trial (R. 576).

The Court of Appeals said, "There was sufficient evidence to support the verdict of the jury" (133 Fed. 2d 519, R. 600, P. C. 55).

This concurrence of the trial court and the Court of Appeals on this question of fact concludes this Court. *United States* v. *Johnson,* 63 S. Ct. 1233, 87 L. Ed. (Advance Sheets) 1117; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.,* 316 U. S. 364, 86 L. Ed. 1537; Digest, Title "Appeal", Key No. 1506.

According to witness Greer, as quoted in the opinion of the Court of Appeals (R. 601; 133 Fed. 2d 519; P. C. 55):

> "When I was in the thin fog, the thick fog did not look like fog to me. It looked like smoke over the road and you couldn't tell what distance it was. Driving into the fog you would get into it before you could see it. * * *"

So that negligence may not be here controverted.

IV.

The majority of the Court of Appeals reversed because they assumed to find "It is settled by a long line of Louisiana cases (cited in the margin) that he (Slade) was *guilty of contributory negligence as a matter of law*"* and may not recover "for injuries resulting therefrom", (Respondents' Brief, page 10; R. 603; P. C. 59), while in Gaiennie v. Co-operative Produce Co., (La. Ct. Appeals, 1st Circuit), 196 La. 417, 199 So. 611, Judge LeBlanc declared as to these same decisions:

> **"We * * * were left with serious doubt, in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State, on the question of contributory negligence as pleaded."**

Respondents cite many cases (but none conflicting post-dating the Gaiennie decision), assuming, with deference, wrongfully, to make the question of Slade's conduct a matter, not for the jury, but for the court.

In Louisiana, there is a Supreme Court, consisting of the Chief Justice and six Associate Justices, and there are also three intermediate Courts of Appeal, inferior to the Supreme Court, namely, the Court of Appeals for Orleans; the Court of Appeals, First District, Baton Rouge; and the Court of Appeals, Second District, Shreveport, having three judges each.

As was said by Judge LeBlanc, 196 La. 417, 199 So. 611, in *Gaiennie* v. *Co-operative Produce Co.*

> "After it had been argued and submitted to this court (Louisiana Court of Appeals, 1st Circuit) and we had made a finding of fact on which we readily reached the conclusion that the driver of the truck of the defendant Co-Operative Produce Company, Inc., was guilty of gross negligence, * * * (we) * * * were

* Italics ours, unless otherwise noted.

> left with serious doubt, *in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State,* on the question of contributory negligence as pleaded against the plaintiff, we took the liberty of certifying the case to the Supreme Court of the State, under the provisions of Article VII, Section 25 of the Constitution. (Appendix 1 hereto.) After due consideration, the Supreme Court answered the questions propounded by us handing down a written opinion which has now become final. 199 So. 377 (196 La. 417),"

wherefrom, it is quite apparent:

(a) That this finding of "apparent conflict" among the decisions of the Courts of Appeal of Louisiana was binding upon the Federal Court of Appeals, even though that Court of Appeals was an intermediate court. *West* v. *Amer. T. & T. Co.*, 311 U. S. 223, 85 L. ed. 139, 144; *Six Companies etc.* v. *Highway District No. 13*, 311 U. S. 180, 85 L. ed. 114. And when, pursuant to such finding, the Supreme Court of Louisiana took jurisdiction to rectify, then its interpretation of that requisite under Louisiana's statute for construction was doubly conclusive. *I. C. R. R. Co.* v. *Moore*, 312 U. S. 630, 85 L. ed. 1081.

(b) That whether there was contributory negligence or not in a case of this kind—fog being dealt with by the Louisiana Court on the same basis as blinding headlights—"It is settled by a long line of Louisiana cases" cited in the margin, that he was guilty of contributory negligence, is not accurate; but, on the contrary, the Court of Appeals was "left in serious doubt, in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State, on the question of contributory negligence as pleaded against the plaintiff." There was a parked car on the highway. Plaintiff

> "kept his car in the south lane of travel on the paved portion of the highway which was to his right,

and as he neared the point where the truck was parked he began meeting cars going west or in the opposite direction to that in which he was travelling. There were four or five cars following each other and all of them with the headlights burning so brighly as to dazzle his eyesight intermittently. He dimmed the headlights on his car and slowed down its speed to between 20 and 25 miles per hour.

"The effect of the dazzling lights from the cars he was meeting was that he was not blinded by them but his vision was momentarily and intermittently impaired to the extent that instead of having a full view of the paved highway ahead of him as he had without such impairment, his view of the pavement was limited to approximately 18 or 20 ft. within which distance he could, at the speed he was going, bring his car to a stop. As he had dimmed the headlights on his car, that had the effect of tilting the beam of light downward at an acute angle on the pavement in front of him, this also causing some restriction in his sight of the pavement as far as distance is concerned.

"Plaintiff felt safe in proceeding on the highway under the circumstances, and he did. As he passed the last of the series of cars whose dazzling headlights caused momentary impairment to his ordinary vision, his car, in the meantime covering such distance as its speed carried it, he found himself confronted with the truck parked on the highway without any sign or warning of its presence, some eight or ten feet ahead of him. The rear body of the truck was some 3 or 4 feet above the ground and extended back some four feet over the rear wheels, so that when plaintiff dimmed his lights the titlted beam of his headlights projected under the truck making it that much more difficult for him to see it.

"As the truck loomed in front of him he made an effort to avoid running into it by applying his brakes and pulling his car to the left in order to pass around it. He was too close then, however, to avert a collision. The right front end of his car struck the

rear left end of the truck and because the body of the truck stood lower from the level of the pavement than the radiator and hood of the car by some two to four inches, the front end of the car was pushed under the truck and the upper parts of the car which are made of lighter material such as the radiator, the hood and cowl were badly crushed."

And thereupon, in answering this question, the Supreme Court of Louisiana said:

> "For the reasons set out above, our answer to the first question is that we cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case.
>
> "Our answer to question two is that under the facts outlined the plaintiff was not guilty of contributory negligence."
>
> (199 So., 378, 379, 612, 613).

The *Gaiennie Case* made explicit *Woodley & Collins* v. *Schusters' Wholesale Produce Co.*, 170 La. 527, 128 So. 469, (misunderstood by certain opinions in the State Court of Appeals), which it epitomized, 199 So. 379, 196 La. 417, thus:

> "In discussing whether or not the driver of an automobile should be deemed negligent for failing to slow down, we stated that it depended on the circumstances of the particular case, and that it is not easy, nor safe, to lay down a hard and fast rule on the subject. The difficulty in laying down a hard and fast rule is that the act provides that the conditions and circumstances must be considered as well as the traffic, surface and width of the highway, and the location of the neighborhood. Such being the case, the particular facts of each case must be considered in arriving at a conclusion, and it would not be safe to lay down a hard and fast rule for that reason."

And, further, the Supreme Court of Louisiana said, when referring to the rule made "ironclad" by the Court of Appeals:

> "While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. Jacobs v. Jacobs, 141 La. 272, 74 So. 992, L. R. A. 1917F, 253."

And the Supreme Court of Louisiana approved *Moncrief* v. *Ober,* 3 La. App. 660, wherein the plaintiff ran over a small cable stretched above the public road, and *Kirk* v. *United Gas Public Service Co.,* 185 La. 580, 170 So. 1, wherein the plaintiff admitted seeing the object in the road, but misjudged its character, and the Court approved a finding awarding damages.

So that, when the Court of Appeals says there is "a long line of Louisiana cases" by which the question of "contributory negligence as a matter of law" "is well settled," with deference, it misread completely the Louisiana decisions, chiefly from the Courts of Appeal in that state where the Court may find expressions, with deference, irreconcilable not only between the three Courts of Appeal but in the same Court of Appeals from time to time. We have in Appendix 2 detailed some of these conflicts, wherefrom this Court may verify that said by the Court of Appeals of Louisiana, First Circuit, in the *Gaiennie Case.*

(c) It is interesting to note respondents say (Page 15):

> "It should be noted that petitioners relied upon Futch *v.* Addison et al., 12 La. App. 535, 126 So. 590; Stafford *v.* Nelson Bros., 15 La. App. 51, 130 So. 234, 235; Hanno *v.* Motor Freight Lines, Inc., 17 La. App. 62, 134 So. 317.

> "Each of the above styled cases have been subsequently expressly disapproved or overruled. O'Rourke *v.* McConaughey, (La. C. App., 1934) 157 So. 598 (605); Blahut *v.* McCahil, 163 So. 195 (198)."

With deference to opposite Counsel the Futch, Stafford and Hanno cases are almost, if not quite, in accord with the Gaiennie case, and are, notwithstanding opposite counsel, appropriate expressions of presently applicable Louisiana law.

(1) In the *Futch Case,* 12 La. App. 535 (La. Ct. App., 1st Cir.), 126 So. 590, Futch sued Addison, and recovered. In the opinion, it is said:

> "The evidence shows that plaintiff was driving southward on the highway; * * * at a moderate speed. The obstruction (two saw logs * * * located on a trailer and parked on the western side of the road without lights to warn of its presence) * * * Just as plaintiff reached the bridge, two automobiles were coming northward with glaring headlights; one of them was so near the bridge when plaintiff entered on it that it was necessary for it to slow down in order that plaintiff might get over the bridge before the one nearest entered on it. As plaintiff passed over the bridge, the other automobile, coming north, was about opposite the truck, and plaintiff had to swerve his car to the right * * * in order to make way for it. * * * The glaring lights on the two on-coming automobiles, all helped to hinder plaintiff from seeing the obstruction in the road ahead of him until he was, as he says, within 10 feet of it, and too close to avoid striking it head-on, as he did."

The judgment for plaintiff was affirmed. Note how this squares with the declaration of the Supreme Court in the *Gaiennie Case:*

> "We cannot lay down a hard and fast rule to govern in these types of cases because so much depends upon the circumstances of each particular case"

and in the *Gaiennie Case* plaintiff was likewise allowed to recover when he struck, under markedly similar circumstances the rear end of a truck improperly parked on the highway which plaintiff did not see by reason of headlights.

(2) *Stafford* v. *Nelson Bros.*, 15 La. App. 51, 130 So. 234. Therein, defendant parked a machine weighing 30,000 pounds, nine feet wide, on the highway. Plaintiff sued and recovered, although moving at 35 miles an hour at the time of the injury, the court declaring:

> "We are of the opinion that he actually exercised the ordinary care which any prudent person would have taken confronted, as he was, with imminent danger to his life or bodily harm. Even if he did not exercise the best judgment considering the situation in which he had been placed by the inexcusable negligence of the defendants, he cannot be held liable for the results of the collision."

Thus likewise allowing recovery in a case strikingly similar to the *Gaiennie Case.*

Counsel for respondent concede (page 12):

> "In the reply brief of appellant (respondent) before the Circuit Court of Appeals, it was definitely pointed out that such cases were not applicable because each and all of the cases excusing a driver from contributory negligence were based upon the condition that the obstruction in the highway be unexpected and such as the driver was not required to anticipate and that the driver be guilty of no negligence contributing to the emergency."

And in respondents' brief it is said:

> "Slade, therefore, was not only charged with knowledge that some truck would likely be parked upon the shoulder of the highway (Hutchinson *v.* T. L. James & Company, Inc., (La. C. App., 1935) 160 So. 447), but he was bound to have anticipated that Greer's truck might

> overturn on the shoulder of the highway, and that, in running into the fog blindly, he took a chance upon encountering an obstruction."

But that which opposite counsel urged and which apparently confused the Federal Court of Appeals was that in these three cases the obstruction in each was a truck on the highway and in each of them, the plaintiff running into that truck was injured and in no instance was such plaintiff held guilty of contributory negligence, and in none of these cases was it intimated that the plaintiff should have anticipated the wrongful parking of an unlighted truck.

(3) *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317 (La. Ct. App., 1st Cir.), Certiorari denied July 17, 1931.

There was an unguarded parked truck, and that when driving properly, "there was another automobile approaching him from the opposite direction, whose driver failed to dim his lights; that he pulled over to the right to give the oncoming car the proper amount of road for them to meet, and, in doing so, he ran into this parked truck," and recovery was allowed. It is to be noted that Judge Elliott on the Louisiana Court of Appeals dissented, but these three cases, with deference, under the *Gaiennie Case,* are authorities conforming to the law as laid down by the Supreme Court of that State.

It will be noted that opposite counsel cite as controlling two decisions from the Court of Appeals of Louisiana, *O'Rourke* v. *McConaughey* (1934) (Ct. App. La., Orleans), 157 So. 598 and *Blahut* v. *McCahil* (1935) (La. Ct. App., 1st Cir.), 163 So. 195, 198, which are not necessarily conflicting, due to different facts wherewith the Court was confronted. These predate the *Gaiennie* case, likely contributed to the conflict adverted to, and neither was approved in the controlling opinion.

In the *O'Rourke Case* that Court did not in any way criticize *Peart* v. *Orleans-Kenner Traction Co.* (La. Ct. App., Orleans, 1928), 123 So. 822, 823, where it was said:

> "Contributory negligence is pleaded. As we have observed the record establishes that the deceased stopped, looked, and listened, before crossing the track. It is contended that he either saw or should have seen, heard, or should have heard the electric car. To suppose that he saw or heard and continued on his way is to assume an intention to suicide or a state of imbecility. As to whether he should have seen or heard, and therefore his failure to do so was equivalent to not looking or listening under familiar principles of law, we observe that this rule has no application when surrounding circumstances excuse or prevent his failure to see or hear. Huddy on Automobiles (8th Ed.) Sec. 716; Loftus *v.* Pacific Electric Co., 166 Cal. 464, 137 P. 34.
>
> " 'If the driver of the hearse stopped, looked and listened when he reached the crossing and before going upon the first track, as he testified, and did not see, and could not see, any approaching train, and did not hear, and could not have heard, any signal or noise of a moving train, we are unable to see how the driver could be legally charged with contributory negligence.' Betz *v.* I. C. R. R., 161 La. 929, 109 So. 766, 767. See, also, Townsend *v.* Mo. Pac. R. Co., 163 La. 872, 113 So. 130, 54 A. L. R. 538."

The *Blahut* v. *McCahil Case* was a two-judge opinion, with Judge LeBlanc dissenting, and therein it is said that the *Stafford* case is overruled because:

> "At the time Act No. 232 of 1926 was not the law, but Act No. 296 of 1928 was in effect and the governing law of the case, and section 60 of Act No. 296 of 1928 provided that automobiles should have headlights with

> power to illuminate the road for a distance of 200 feet ahead; and which act and its provisions were not called to our attention, and the case was wrongfully decided and is overruled."

But, notwithstanding, with deference, when the oncoming automobile blinded the driver, the fact that this condition existed would in no way presently change the contention, in that case the court saying:

> "We are therefore convinced that young McCahil was grossly negligent and in fact driving recklessly, and that his negligence was a proximate cause of the accident."

There was likewise a parked truck, without lights and unguarded on the highway and the truck occupied the eastern half of the road. McCahil's car was traveling 40 to 45 miles per hour. McCahil testified he was driving about 40 miles per hour until "he was blinded by the oncoming car, and he then reduced his speed to about 30 miles per hour; that the southbound or oncoming car passed him about 15 feet from the truck; that he perceived the truck as he was passing the other car at about 15 feet away, and he immediately cut his wheel to the left, his right front door striking the ends of the pilings; that he did not have the best of lights, but that they were 'pretty good'; that the lights were medium, and the coming car had lights of the same type, enough however to blind him; that he had bad eyesight ever since he was six years old, and that he had had *five other* accidents prior to this one; that he had no time to apply his brakes; and that he had just time to somewhat swerve his car to the left."

(c) Opposite Counsel deny the possible applicability of the "emergency" doctrine, so-called, claiming responsibility

for not stopping when Slade is asserted to have seen the fog. Slade could not testify, and, with deference, the Louisiana Court has put blinding headlights upon the same footing substantially as fog, as to contributory negligence, and we thus have an obstruction in an interstate highway, wrongfully concealed by defendants' act. The act of the driver was precisely the same, whether there were fog or blinding headlights, and in at least one case, the emergency doctrine is thus applied.

In *General Exch. Ins. Corp.* v. *Romano* (1st Cir., La. Ct. App., 1939), 190 So. 168, there was collision between a parked truck * * * awkwardly parked * * * without lights, adjoining the highway, wherein with one dissent it was adjudged that no cause of action was stated, and therein it was said:

> "In the cases of Woodley & Collins *v.* Schusters' Wholesale Produce Co., Inc., 170 La. 527, 128 So. 469, and Blahut *v.* McCahil et al., La. App., 163 So. 195, it was held that where a motorist is blinded by bright headlights of an oncoming car, it is negligence for him to fail to slow down and bring his car under such control as to be able to stop for such a large and bulky obstruction in the highway as a truck parked thereon.
>
> "The cases of Stafford *v.* Nelson Brothers, 15 La. App. 51, 130 So. 234, and Hanno *v.* Motor Freight Lines, Inc., 17 La. App. 62, 134 So. 317, seem to be in conflict with the statement made above. It appears, however, that in those cases the court relied on the sudden emergency doctrine, holding that the drivers who ran into the obstructions in the highway—an excavating machine in the former case and a parked truck in the latter—were confronted by a sudden emergency created by the appearance of these large obstructions which loomed up in front of them, and under this situation the drivers were not required to use the same clear judgment as would have been the case had there been no sudden emergency."

Broussard v. *Krause*, (1st Cir.), 186 So. 384, was an action for damages arising for a collision between a parked truck and an automobile:

> "In one of the cases decided by the Supreme Court of this State which is cited by the defendants in support of their exception, Woodley & Collins *v.* Schuster's Wholesale Produce Company, 170 La. 527, 128 So. 469, 470, the Court merely stated it as a *general* rule that the driver of an automobile under the circumstances stated is guilty of negligence, and it is rather significant to note that in the sentence preceding that statement, the Court said, 'Whether it should be deemed negligence for the driver of an automobile to fail to slow down, in a case like this, depends so much upon the circumstances of the particular case that *it is not easy nor safe to lay down a hard and fast rule on the subject.*' (Italics ours—the court's). In the case of Kirk *v.* United Gas Public Service Company, 185 La. 580, 170 So. 1, the Supreme Court quoted with apparent approval the following ruling from Blashfield Cyclopedia of Automobile Law and Practice, Permanent Edition, Vol. 5, page 455, Section 3320: 'In the absence of notice to the contrary, there are certain assumptions which may be indulged by a motorist as to the condition of public streets and highways, whether he be traveling by day or by night. Among these are: (a) that the way is reasonably safe for travel and free from defects and unlawful obstructions.' The Court then goes on to state that the rule as stated prevails in this State as laid down as follows in Jacobs *v.* Jacobs, 141 La. 272, 74 So. 992, 997, L. R. A. 1917F, 253: 'The rule is well established in the jurisprudence of this state that a person using a public highway * * * has a right to presume and act upon the presumption, that the way is safe for ordinary travel, even at night.' * * *
>
> "In certain cases in which the driver of a car was blinded by the glaring headlights of another car which was approaching him from the opposite direction in which he was traveling as he emerged out of a curve,

or where the two cars met in such close proximity to an unlighted parked truck on the highway that the blinding occurred when it was altogether impossible for him to stop his car in time to avoid running into the parked truck, he was relieved of the charge of contributory negligence on the ground that his negligence was not the proximate cause of the accident. Futch *v.* Addison, 12 La. App. 535, 126 So. 590; Hanno *v.* Motor Freight Lines, 17 La. App. 62, 134 So. 317; Holcomb *v.* Perry, 19 La. App. 11, 138 So. 692."

In *Goodwin* v. *Theriot* (1st Cir.), 165 So. 342:

"From the provisions of our state statute already referred to, and provisions of a similar import from statutes in other states, there has been formulated in the jurisprudence a rule to the effect that the driver of an automobile on the public highways at night must keep his car under such control as to be able to bring it to a complete stop within the distance which his headlights project in front of him. This court has held in certain cases that this was not an inflexible rule, and that its application depends on the facts and circumstances arising in each case. In certain cases cited by the district judge as authority in this case, because of the peculiar facts, the rule was relaxed and the driver of the automobile was held free of negligence. These are the cases of Futch *v.* Addison, 12 La. App. 535, 126 So. 590; Stafford *v.* Nelson Bros., 15 La. App. 51, 130 So. 234; Hanno *v.* Motor Freight Lines, Inc., 17 La. App. 62, 134 So. 317. In all three of these cases, however, it was shown that the driver of the automobile was going at a moderate rate of speed, and that, as he approached the parked object on the highway, he became suddenly and temporarily blinded by the glaring headlights of another car coming from the opposite direction. The unexpected emergency thus created stood as the important and determining factor in especiallly two of those cases. In the absence of any such emergency, the present case is readily distinguishable from those referred to. It is

to be observed, moreover, that this court *in a recent case has gone far in the direction of holding the driver guilty of contributory negligence without regard to the emergency created by dazzling lights from another car,* holding that it is his duty to have his car under control in such a situation as to be able to stop it 'in a moment.' See Blahut *v.* McCahil et al. (La. App.), 163 So. 195."

(e) Certain Federal Cases and other authorities.

Compare *Chesapeake & O. Ry. Co.* v. *Waid,* 4 Cir., 25 Fed. (2d) 366, where Judge Parker said:

"And, to quote again what was said by Mr. Justice Lamar in Grand Trunk Ry. *v.* Ives, 144 U. S. 408, 417, 12 S. Ct. 679, 682, 366 L. Ed. 485, quoted with approval by Chief Justice Fuller in Baltimore & O. R. Co. *v.* Griffith, 159 U. S. 603, 611, 16 S. Ct. 105, 108 (40 L. Ed. 274), and by Mr. Justice Harlan in Texas & P. R. Co. *v.* Gentry, 163 U. S. 353, 368, 16 S. Ct. 1104, 1109 (41 L. Ed. 186):

" 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care', 'reasonable prudence', and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannnot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the

determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.' "

Compare 37 A. L. R. 590 (note); 73 A. L. R. 1025 (note).

(f) Complaint is made that petitioner did not rely on *Gaiennie* v. *Co-Operative Produce Company* in the Court of Appeals (Respondents' Brief, 12). But,

(1) Petitioner did call this case to the attention of the Court of Appeals, with its subsequent judicial history, before this writ was applied for, so that the Court of Appeals was fully acquainted therewith and could have conformed thereto;

(2) Petitioner contended, under other cases cited, for the precise rule laid down in the *Gaiennie case,* and insisted that these decisions thus controlled, especially those cases herein relied on;

(3) But, if our interpretation of the *Gaiennie case* is correct, it was and is the controlling decision of the Louisiana Supreme Court. It was directly incumbent upon the defendant, when the judgment of the District Court conformed to the *Gaiennie case,* not to seek a reversal of this District Court judgment, in conformity with the Gaiennie decision of the Supreme Court of Louisiana, controlling, without disclosing to the Federal Court of Appeals that respondents' contention was in contravention of the *Gaiennie case* and by the *Gaiennie case* denied. In other words, respondent has caused, by failure to properly advise the Federal Court of Appeals as to the *Gaiennie case,* a judgment to be rendered contrary to and in conflict with the law as settled under a local statute by the Supreme Court of Louisiana.

(g) Petitioners, of course, rely strongly on the contention that in this case contributory negligence is no defense (P. C. 35).

V.

Opposite Counsel Claim That Slade "Struck Greer's Overturned Truck With a Terrific Impact Shearing the Steel 'King Pin' Approximately Three Inches in Diameter, Releasing the Trailer to His Truck, Which Plowed Forward Into the Cab * * *" (Brief, Page 9).

Supplementing that said in the petition, we add:

Therein, respondents misconceive the record. Respondents cite therefor "R., 95", wherefrom we quote:

> "A. He (Slade) had the old type fifth wheel. I believe they call it a yoke and pin.
> "Q. And the center ball would be 3 inches in diameter?
> "A. Yes, and the two angle irons that come up with a hole in them and the pin drops down in that hole.
> "Q. That is what gave way?
> "A. Yes, sir."

The same witness testified (R. 56):

> "The trailer came off the fifth wheel and came in on Mr. Slade and crushed the cab."

With deference, the steel three-inch ball did not break, nor did this witness so say.

"The burden of proof is on the defendant to show that the plaintiff was negligent and that his negligence contributed to the injury." *Gaiennie* v. *Co-Operative Produce Co., supra.*

"The value of a photograph as evidence is not for the court to determine, but the jury." *Cyc. Automobile Law, Huddy,* 9th Ed., Vols. 19-20, Sec. 26, page 131.

Defendant did not question any witness as to how or why the Fifth wheel gave way, nor did it endeavor to show that said pin or irons had not become crystallized or "fatigued". Thereasto, this Court may take judicial notice. *Johnson* v. *Atlantic Coast Line Railroad,* 112 S. C. 47, 99 S. E. 755.

"Iron subjected to strain has a tendency to crystallize and become brittle and weak." *Wilkinson* v. *Evans* (1907) 34 Pa. Sup. Ct. 472.

Nowoty v. *St. Louis Brewing Assn.*, (1914) 185 Mo. App. 709, 171 S. W. 941.

In *American Airways* v. *Ford Motor Co.*, (1939) 10 N. Y. Supp. (2) 816, 170 Misc. 721, it is said:

> "There is no doubt that the hub broke through fatigue break. That is a crack caused by repeated stresses and any one of which might be successfully resisted by the metal. It was shown that metal objects stand strains of certain force indefinitely without discoverable effects. Greater forces produce results only after repeated applications. This is called fatigue. It takes the form of a crack in the object, which may be in the interior and not visible upon the surface. This crack grows, very slowly at first but with increasing speed, and the final states of growth, which ends in a separation of the metal object into two broken parts, is very rapid indeed."
>
> *Johnson* v. *Atlantic Coast Line Railroad*, 112 S. C. 47, 99 S. E. 755.

Had crystallization or fatigue occurred, the break might have well happened without any strain at all, but with the burden resting upon defendant thus to show, it saw fit not to introduce any evidence wherefrom a presumption adverse to it and favorable to Slade should be integrated into the decision of this cause.

VI.

Other Inaccuracies.

With deference, respondents' contention as to the facts, especially when in conflict with the facts as claimed by petitioners, are inaccurate.

VII.

Resume.

The majority of the Court of Appeals assumed to say,

"It is settled law in Louisiana that one entering a fog * * * must proceed at such a speed as he can stop the car in the distance within which he can see objects in his way", but we repeat that said by the *Gaiennie Case* in the Court of Appeals of Louisiana, first circuit, "but were left with serious doubt in view of the apparent conflict in some of the decisions of the various Courts of Appeal of this State on the question of contributory negligence as pleaded against the plaintiff. 199 So. 611," which declaration as to conflict is conclusive on the Federal Court. *West* v. *American T. & T. Co.*, 311 U. S. 223, 85 L. Ed. 139, 144; *Six Companies* v. *Highway Dist. No. 13*, 311 U. S. 180, 85 L. Ed. 114.

Wherefore, for the reasons set forth in the original brief and those supplemented herein, we, with deference, insist that the writ should be granted; otherwise plaintiff, who would have recovered in the Louisiana Courts under a verdict for it, will be denied that right in the Federal Court through the Federal Court having refused to follow the State decisions of the Supreme Court construing a local statute.

Respectfully,

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APPENDIX 1.

New Constitution of Louisiana Adopted June 18, 1921, Article VII, Sec. 25:

> "Each Court of Appeal shall have power to certify to the Supreme Court any question of law arising in any cause pending before it concerning which, for its proper decision, it desires the instruction of that court; and thereupon the Supreme Court may either give its instruction on the question certified to it, which shall be binding upon the Court of Appeal in such case, or it may require that the whole record be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been on appeal directly to the Supreme Court."

APPENDIX 2.

Respondents' counsel contend (Brief, page 10):

> "It is settled law in Louisiana that one entering a fog * * * must stop until sure of his way, or, if he drives into it, he must proceed at such a speed as that he can stop the car in the distance within which he can see objects in his way."

As sustaining this rule, counsel cite:

(1) *O'Rourke* v. *McConaughey,* (Ct. Appeals La., Orleans, 1934), 157 So. 598, which was distinguished *supra;* also in Petition for Certiorari, pages 25, 62. In addition, this was a case wherein the doctrine of the last clear chance was applied. The Court said:

> "Plaintiff's negligence having expended itself, his car being stationary and having been thus for several minutes before the collision, defendant only was in a position to avoid the impact. His was the last clear chance. * * *
>
> "While under certain circumstances creating an emergency the rule may be different, there is little or no excuse for running into a stationary object, par-

> ticularly one which has been stationary for some time before the collision, whether it be daylight or dark, clear or foggy, misty or rainy."

But compare the *Gaiennie Case, supra,* in the Supreme Court.

(2) *Raziano* v. *Trauth,* (La. Ct. App., Orleans, 1931) 131 So. 212. Distinguished, Petition, page 64.

"The sole question is whether defendant had the last clear chance of avoiding the accident." This was not a decision of the Supreme Court.

(3) *Penton* v. *Fisher,* (Ct. App. La., 1st Cir., 1934), 155 So. 35.

This case assumed to follow *Woodley & Collins* v. *Schusters' Wholesale Produce Co.,* 170 La. 527, 128 So. 469, 470, wherein the Court said (in the *Penton Case*):

> "Penton was driving about as slow as he could, and seems to have been on the lookout for danger ahead, but an automobile suddenly appeared in the darkness ahead on the wrong side of the road without lights and diagonally across the road, apparently blocking his way, was something which he had no reason to expect and could not discover any sooner than he did."

A recovery was thus allowed.

Thus contradicting the declaration in the *O'Rourke Case* as to the presence of other cars on the highway, being in direct conflict thereasto.

(4) *King* v. *Jamstremski,* (Ct. App. La., 1st Cir.) 6 La. App. 355, 357, note, 73 A. L. R. 1026.

This, too, was a Court of Appeals opinion, not the Supreme Court, and in that case plaintiff's son, who sued, was on the wrong side of the road, driving without lights, which was held to be contributory negligence barring recovery from defendant, likewise guilty of negligence.

(5) *Lapeze* v. *O'Keefe,* (Ct. App. La., Orleans) (1935), 158 So. 36.

Distinguished and commented on, Petition, pages 32, 66.

This was a case wherein a guest sued the driver for a collision. The driver was going about 35 miles an hour and in a fog "lost his sense of direction, and the right wheel of the car slipped off of the surfaced roadway onto the graveled shoulder of the road, which was several inches lower than the paved portion. He attempted to swing the car back on the road, but the right wheels caught on the side of the paved roadway. O'Keefe attempted to step on the brakes, but missed them, and the car rolled down the embankment and collided with a tree."

In the *Lapeze Case* reference was made to Ward *v.* Donahue, 8 La. App. 335 (La. Ct. App., 2nd Cir.). There, it was said:

> "It has been repeatedly held that the driver of an automobile in proceeding along a city street when he is blinded by the lights of another car or blinded by fog, smoke or dust, or when the windshield is so covered with rain water that his view ahead is obstructed, is guilty of negligence, and that it is his duty to look around the end of the windshield if that is the only way in which he can proceed in safety, and in extreme cases to stop."

(6) *Hutchinson* v. *James,* (1935; Ct. App. La., Orleans) 160 So. 447.

Distinguished in Petition, page 66.

This likewise was a Court of Appeals decision. Therein plaintiff's automobile struck defendant's truck parked in a dense fog, and was stationary but a few seconds on the extreme right of the highway with the right wheels resting on the shoulder. A platform protruded beyond the rear wheels and the paint was discolored and worn from use, affecting "its visibility". Plaintiff was traveling about 15 miles an hour, but finding the fog very thick and unable to see more than three feet in front of his automobile was going about eight miles an hour when it struck the truck. Defendant's driver got out to look for vehicles, and in that case, the Court of Appeals misinterpreted the case of *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, as

later construed by the Supreme Court in the *Gaiennie Case.* Respondent cannot show on this record, or at least the jury could have properly found, that Slade could have stopped within the line of his vision, and that in colliding, he did not suffer any injuries whatever from the front, but to the rear the fifth wheel gave way from crystallization or other cause and thereby caused his death. The extent of the strain placed upon the Fifth wheel, defendant did not explain or attempt to explain.

(7) *Rector* v. *Allied Van Lines,* (1940, La. Ct. App., 2d Cir.), 198 So. 516.

Distinguished, Petition, page 65.

This, also, was a Court of Appeals decision, wherein plaintiffs, or their representatives were parked in a Chevrolet car without lights and this is a case wherein the last clear chance was applied. The Court of Appeals of the Second Circuit referred to *Hudson* v. *Provensano,* 149 So. 240, wherein that court indicated that contributory negligence of those thus situated would have barred, but as to what constitutes contributory negligence under the Louisiana statute there is no hard and fast rule and each case must be determined on its own merit.

(8) *Strauss & Son* v. *Childers,* (1933, La. Ct. App. 2d Cir.) 147 So. 536, is likewise a Court of Appeals decision, containing conflicts wherefor rectification was essential.

(9) *Castille* v. *Richard,* (1924) 157 La. 274, 102 So. 398.

See Petition, pages 16, 25, 64.

(10) *Dominick* v. *Haynes Bros.,* (1930; Ct. App. La., 2d Cir.) 127 So. 31.

See Petition, page 64.

(11) *Campbell* v. *Texas & P. Ry. Co.,* (1938; Ct. App. La., 2d Cir.) 339.

This case is appropriately stated in the syllabus:

> "Where motorist, to avoid danger from fire which threatened filling station where he was, drove away

from the filling station on a section of the highway which was obscured by smoke from the fire, and because of the smoke was injured by collision with another car, his contributory negligence barred recovery either from the railroad which was responsible for the fire or from the other motorist, where plaintiff motorist could have driven onto an unobscured section of the highway, or onto a side road."

(12) *Pepper* v. *Walsworth,* (La. Ct. App. 2d Cir.) 6 La. App. 610. The third Syllabus thereof is:

"When the driver of an automobile on a public highway at night finds himself blinded by the bright lights of an approaching car, or if at any time his view of the road is obstructed by dust, smoke or fog, it is his duty to bring his vehicle under such control that he will be able to stop it at once in case of emergency, and in some cases to stop his car until the obstruction to his view is cleared."

(13) *Woodley & Collins* v. *Schusters' Wholesale Produce Co., supra,* especially as paraphrased in the *Gaiennie Case.*

(14) *Safety Tire Service* v. *Murov,* (La. Ct. App., 2d Cir., 1932), 140 So. 879.

Therein, it was said:

"Plaintiff's driver was traveling at a rate of speed of thirty to thirty-five miles per hour just prior to meeting the car going north, and how much he reduced his speed is not shown. It is contended by defendant that he should have reduced his speed upon being blinded by the lights of the approaching car to such a speed as to have been able to stop immediately, if faced with an emergency.

"This court has adopted that principle of law in the case of Woodley & Collins *v.* Schuster's Wholesale Grocery Co., 12 La. App. 467, 124 So. 559, affirmed by the Supreme Court in 170 La. 527, 128 So. 469."

And the opinion concluded thus:

"Plaintiff relies on the case of Hanno *v.* Motor Freight Lines, Inc., decided by the First Circuit, Court

of Appeal, and reported in 17 La. App. 62, 134 So. 317. The opinion of the majority of the court in that case is directly in conflict with the ruling of this court and the Supreme Court of the state in the case above cited. The dissenting opinion of Judge Elliott is more in conformity with what we consider the jurisprudence of this state, and a universal ruling, with few exceptions."

So that, it is perfectly obvious that the decision in the *Gaiennie Case* was essential to straighten out this confusion.

(15) *Harper* v. *Holmes*, (Ct. App. La., 2d Cir., 1939) 189 So. 465.

There an automobile collided with the rear end of a wagon wherein the plaintiffs were, when defendant, operating the automobile had been blinded by oncoming lights. Judgment for plaintiff was sustained because:

"Since the defendant was blinded, the fact that plaintiffs' wagon was not properly equipped with lights required by law passes out of the case as a sound defense. It could not have been a proximate cause of the collision, for the reason that when one is blinded by the lights of another car he cannot see either objects or lights and if plaintiffs' wagon had been equipped with lights as specified by law, the accident would have happened just the same. We, therefore, conclude that the lower court was correct in sustaining the plea of contributory negligence."

(16) *Maggio* v. *Bradford Motor Express*, (1937; Ct. App. La., Orleans) 171 So. 859.

Distinguished, Petition, page 65. Herein, the Court of Appeals declared the fact that ones vision is not clear places upon him a greater duty of care than would exist under ordinary circumstances.

(17) *Mansur* v. *Abraham*, (Ct. App. La., 1st Cir., 1935) 164 So. 418. Therein was a quotation from the *O'Rourke Case* thus:

"From the foregoing jurisprudence of this state the

general rule emerges, *by the weight of authority,* that the operator of a motor vehicle on a public highway shall have his car under such control that he can bring it to a complete stop within the range of his vision or the penetration of his headlights,"

whereasto thus even the *O'Rourke Case* admits there is a contrariety and assumes to decide on the strength of the weight.

(18) *Arbo* v. *Schulze,* (Ct. App. La., Orleans) (1937) 173 So. 560, involved a question of pleading wherein recovery was denied because:

"No matter how it was parked or of what material constructed, the truck was far enough away when he saw it to enable plaintiff to avoid striking it."

(19) *Russo* v. *Aucoin* (Ct. App. La., 1st Cir., 1942), 7 So. 2d 744.

Distinguished, Petition, page 66, and, in general, was a case of the last clear chance.

(20) *Mouton* v. *Talbot & Son* (1935; Ct. App. La., 1st Cir.), 161 So. 899. Therein, the syllabus accurately reflects the holding:

"Motorist, driving in rain at night with dim lights at about 25 miles an hour and failing to slow down or stop on reaching guard, stationed behind disabled truck without rear lights burning to warn traffic while owner thereof was attempting to remove it from highway, held guilty of negligence proximately causing collision with rear end of truck, so as to bar his recovery of resulting damages from owner (Act No. 21 of 1932, Sec. 3, rules 4 (a), 15, 15 (c)."

(21) *Becker* v. *Mattel* (1936, Ct. App. La., Orleans), 165 So. 474.

Therein, the second syllabus is:

"Motorist driving on dark misty night at rate of twenty miles per hour while headlights of approaching

automobile interfered with his vision, and passing within eight inches of parked automobile around which three boys were standing, held guilty of negligence and liable for injuries to boy who was struck while standing at side of parked automobile."

(22) *Penton* v. *Sears, Roebuck & Co.* (1941; Ct. App. La., 1st Cir.), 4 So. 2d 547.

This was distinguished Petition, page 66. Therein, it was said:

"When there is any condition in the weather which affects visibility, such as fog, rain, or smoke, it is the duty of the driver of a motor vehicle to take extra precautions to meet such unusual circumstances. 1 Blashfield, Cyclopedia of Automobile Law and Practice, Perm. Ed., p. 501, Sec. 689. The evidence in this case does not show, however, that there was any serious impairment of Penton's vision as it seems that he was able to see a sufficient distance, as already stated, for him to be aware of the presence of the truck in his lane of traffic and avoid running into it had he been going at a proper speed and keeping a proper lookout, with his car under control."

(23) In *Louisiana Power & Light Co.* v. *Saia,* 188 La. 358 (1937), 177 So. 238, the question arose on an exception of no cause of action, and it was there said:

"It is our opinion that the plaintiff's petition affirmatively alleges facts showing that its employee was guilty of contributory negligence, because the single and solitary reason assigned for not seeing or discovering the presence of the truck and trailer was that 'it was quite dark.' Under these circumstances, the defendants have a right to raise the issue of contributory negligence by exceptions of no right or cause of action, and this is particularly true where the plaintiff was not denied the right to amend its petition to show additional reasons why its employee failed to discern the unlighted parked vehicle."

Had there been lights or fog caused by defendant, then, as shown in the *Gaiennie Case,* it would have been a question for the jury.

(24) *Pollet* v. *Robinson Lumber* Co. (Ct. App. La., Orleans), 123 So. 155.

Therein, the second syllabus accurately states the rule:

> "Even if it be held negligence to drive along a highway after dark without a light a team of mules unhitched to a vehicle, it was contributory negligence, constituting proximate cause of collision with them of an automobile, for motorist to fail to have his car under such control as would have permitted his stopping within the distance illuminated by his lights, but for which the accident could not have occurred."

Therefore, the declaration in the *Gaiennie Case* in the Court of Appeals that there was, as to contributory negligence, want of certainty * * * conflict * * * is manifestly borne out by an examination of the facts in these several cases, and, with deference, the decisions as to contributory negligence have not been consistent and the *Gaiennie Case* was essential to bring about rectification and certainty.